EDITOR'S NOTE

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No. 86-327-CFX
Status: GRANTED

Docketed:
August 29, 1986

Title: Mullins Coal Company, Inc. of Virginia, et al., Petitioners
v.
Director, Office of Workers' Compensation Program, United States Department of Labor, et al.

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Solomons, Mark E.

Counsel for respondent: Solicitor General, Barnette, David A., Smith III, S. Strother, Lowe, C. Randall

Entry	Date	Note	Proceedings and Orders
1	Jul 3 1986		Application for extension of time to file petition and order granting same until August 29, 1986 (Chief Justice, July 8, 1986).
2	Aug 29 1986	G	Petition for writ of certiorari filed.
3	Aug 29 1986		Appendix of petitioner Mullins Coal Co., et al. filed.
5	Sep 25 1986		Order extending time to file response to petition until November 3, 1986.
6	Sep 25 1986		The above extension applies to all respondents.
8	Oct 6 1986		Order extending time to file response to petition until October 31, 1986.
9	Oct 6 1986		Above extension applies to counsel for Luke Ray ONLY.
10	Oct 20 1986	G	Motion of National Coal Association for leave to file a brief as amicus curiae filed.
11	Oct 30 1986		Order further extending time to file response to petition until December 2, 1986.
12	Oct 30 1986		The above extension applies to all respondents.
13	Oct 31 1986		Brief of respondent Luke Ray in opposition filed.
14	Oct 31 1986	G	Motion of respondent Luke R. Ray for leave to proceed in forma pauperis filed.
16	Dec 3 1986		DISTRIBUTED. January 9, 1987
17	Dec 2 1986	X	Brief of respondents Dir. OWCP, etc., et al. in opposition filed.
19	Jan 12 1987		Motion of National Coal Association for leave to file a brief as amicus curiae GRANTED.
20	Jan 12 1987		Motion of respondent Luke R. Ray for leave to proceed in forma pauperis GRANTED.
21	Jan 12 1987		Petition GRANTED.
			**********
22	Feb 5 1987		Record filed.
23	Feb 5 1987	G	Motion of petitioners to dispense with printing the joint appendix filed.
25	Feb 13 1987		Order extending time to file brief of petitioner on the merits until March 19, 1987.
26	Feb 23 1987		Motion of petitioners to dispense with printing the joint appendix GRANTED.
27	Mar 19 1987		Brief of petitioners Mullins Coal Co., et al. filed.
28	Mar 19 1987		Brief of respondent Westmoreland Coal Company in support of

No. 86-327-CFX

Entry	Date	Note	Proceedings and Orders
			petition filed.
29	Mar 19 1987	G	Motion of National Coal Association for leave to file a brief as amicus curiae filed.
30	Mar 19 1987		Brief of respondents Dir. OWCP, etc., et al. filed.
31	Mar 30 1987		Motion of National Coal Association for leave to file a brief as amicus curiae GRANTED.
33	Apr 10 1987		Order extending time to file brief of respondent on the merits until May 22, 1987.
34	Apr 16 1987	G	Motion of the Solicitor General for divided argument filed.
35	Apr 27 1987		Motion of the Solicitor General for divided argument GRANTED.
36	May 7 1987	D	Motion of respondent Ray for divided argument filed.
37	May 15 1987		Brief of respondent Luke Ray filed.
38	May 20 1987		Brief amicus curiae of United Mine Workers of America filed.
39	May 28 1987		Record filed.
40	May 20 1987	D	Motion of United Mine Workers of America for leave to participate in oral argument as amicus curiae, for additional time for oral argument and for divided argument filed.
41	Jun 8 1987		Motion of United Mine Workers of America for leave to participate in oral argument as amicus curiae, for additional time for oral argument and for divided argument DENIED.
42	Jun 19 1987	G	Motion of respondent Stapleton for leave to proceed further herein in forma pauperis filed.
43	Jun 19 1987	G	Motion of respondent Stapleton for leave to file a brief on the merits, out- of-time, filed.
44	Jun 19 1987		DISTRIBUTED. June 25, 1987. (Motions of respondent
45	Jun 19 1987		Stapleton for leave to proceed further herein in IFP and also motion for leave to file a brief on the merits, out-of-time).
46	Jun 26 1987		Motion of respondent Ray for divided argument DENIED.
47	Jun 26 1987		Motion of respondent Stapleton for leave to proceed further herein in forma pauperis GRANTED.
48	Jun 26 1987		Motion of respondent Stapleton for leave to file a brief on the merits, out- of-time, GRANTED.
49	Jul 6 1987		Brief of respondent Gerald Stapleton filed.
50	Jul 17 1987		CIRCULATED.
51	Jul 20 1987		SET FOR ARGUMENT. Wednesday, October 14, 1987. (3rd case).
52	Sep 10 1987		Decision of 6th Circuit (Patton v. National Mines Corp.) received and circulated.
54	Oct 6 1987	X	Reply brief of respondents Dir. OWCP, etc., et al. filed.

86-327

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY and JEWELL RIDGE COAL CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

The Fourth Circuit en banc has issued a decision which substantially revises the rules of evidence and procedure which have been applied for many years in hundreds of thousands of claims under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945.

The Court of Appeals held that black lung claimants seeking to obtain the great advantage of the key presumption of eligibility for benefits in 20 C.F.R. § 727.203 (1986) will do so as a matter of law by presentation of any supporting evidence whether or not such evidence is credible or reliable, or the fact to be found on the basis of it is supported by a preponderance of the relevant evidence.

The questions presented in this context are:

1. Does the Black Lung Benefits Act or any authority expressly supersede the preponderance rule and evidentiary standards of 5 U.S.C. § 556(d), within the meaning of 5 U.S.C. § 559?

2. Should the Court of Appeals have accorded substantial deference to the contemporaneous, consistent, and 14-year-long standing interpretation of the regulation by both the Secretary of Labor and the Secretary of Health and Human Services, and the reliance placed thereon by claim parties?

LIST OF PARTIES AND RULE 28.1 STATEMENT

This matter involves three separate claims for black lung benefits which were consolidated in the first instance by the Court of Appeals. The parties below and their respective postures in this petition are as follows: Glenn Cornett was a claimant/respondent below and his last employer, the Mullins Coal Company, Incorporated of Virginia ("Mullins") was the petitioner below. The Old Republic Insurance Company ("Old Republic"), also a petitioner below, is the black lung insurance carrier for Mullins. Luke Ray was the claimant/petitioner below and his last employer, the Jewell Ridge Coal Corporation ("Jewell Ridge"), was the respondent below. Gerald R. Stapleton was the claimant/petitioner below and his last employer, the Westmoreland Coal Company, was the respondent below. The Director, Office of Workers' Compensation Programs, United States Department of Labor, is the administrator of the Black Lung Program and was an intervenor in all three cases before the Court of Appeals. The Director, by delegation of authority from the Secretary of Labor, is a statutory party in all black lung claim proceedings, 30 U.S.C. § 932(k).

Mullins, Old Republic and Jewell Ridge are the petitioners herein and all other parties below are respondents.

Mullins and the Westmoreland Coal Company are wholly independent corporations without parent, subsidiary or other corporate relationships which must be listed under Rule 28.1. Old Republic is a wholly-owned subsidiary of the Old Republic International Corporation. Jewell Ridge is an inactive corporate entity, the assets of which are wholly-owned by the Pittston Companies.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY and JEWELL RIDGE COAL CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Mullins Coal Company, Incorporated of Virginia, Jewell Ridge Coal Corporation, and the Old Republic Insurance Company, respectfully ask that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 26, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals in *Stapleton v. Westmoreland Coal Co.* is reported at 785 F.2d 424 and is

reprinted in the Appendix (App. 1a). The order of the Court of Appeals denying rehearing is unpublished and is reprinted in the Appendix (App. 152a). In Cornett's claim, the order of the Benefits Review Board denying reconsideration (App. 135a), the decision and order of the Benefits Review Board (App. 138a) and the decision and order of the administrative law judge (App. 141a) are all unreported and are reprinted in the Appendix as noted. In Ray's claim, the decision and order of the Benefits Review Board (App. 118a) and the decision and order of the administrative law judge (App. 125a) are unreported and are reprinted in the Appendix as noted. In Stapleton's claim, the decision and order of the Benefits Review Board (App. 102a) and the decision and order of the administrative law judge (App. 106a) are unreported and are reprinted in the Appendix as noted.

JURISDICTION

The decision of the Court of Appeals was entered on February 26, 1986. A timely petition for rehearing was denied by Order entered on April 21, 1986. On July 8, 1986, the Chief Justice signed an order extending the time for filing this petition for a writ of certiorari to and including August 29, 1986 (App. 155a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

Jurisdiction was conferred on the Court of Appeals in each of the three cases by the filing of a timely petition for review of a decision and order of the Benefits Review Board, United States Department of Labor, in accordance with 33 U.S.C. § 921(c) as incorporated by reference into 30 U.S.C. § 932(a).

STATUTES AND REGULATIONS INVOLVED

The following statutes, regulations, and published regulatory materials are reprinted in the Appendix:

1. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (App. 166a).

2. Section 12 of the Administrative Procedure Act, 5 U.S.C. § 559 (App. 167a).

3. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a) (App. 168a).

4. Section 19(d) of the Longshore Act, 33 U.S.C. § 919(d) (App. 169a).

5. 20 C.F.R. § 727.203 (1986), 43 Fed. Reg. 36825-36826 (Aug. 18, 1978) (App. 156a).

6. Published Commentary on 20 C.F.R. § 727.203, 43 Fed. Reg. 36826 (Aug. 18, 1978) (App. 158a).

7. 20 C.F.R. § 410.490 (1972) (App. 163a)

STATEMENT OF THE CASE

A. Background

The Black Lung Benefits Act, 30 U.S.C. §§ 901-945,[1] provides for the payment of workers' compensation benefits on account of total disability or death due to coal workers' pneumoconiosis, which is variously called black lung disease or simply pneumoconiosis. Pneumoconiosis is

[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981 and the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635.

a disease of the lung, which may be caused in coal miners by the inhalation of coal dust (30 U.S.C. § 902(b)). The coal mine operator which last employed the miner, or its insurance carrier, may be liable for the payment of benefits to an eligible claimant on a claim filed after June 30, 1973.[2] 30 U.S.C. §§ 925(a), 932(b), 933, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).[3]

Claims after June 30, 1973 are filed with the Secretary of Labor. Claims are processed and adjudicated in accordance with procedures set forth in the Longshore Act, 33 U.S.C. §§ 901 *et seq.*, which are incorporated by reference into the Black Lung Benefits Act, 30 U.S.C. § 932(a).

These procedures contemplate an informal adjudication by the Labor Department, 33 U.S.C. § 919(a)-(c). If that effort fails, there is a hearing *de novo* on the record before an administrative law judge (ALJ), 5 U.S.C. § 554 (incorporated by reference into 33 U.S.C. § 919(d)). A party dissatisfied with the ALJ's decision may appeal to the Benefits Review Board. A further appeal as a matter of right is available to the court of appeals for the circuit in which the injury occurred. 33 U.S.C. § 921(c). The court of appeals, like the Board, reviews the ALJ's decision to determine whether it is supported by substantial evidence

[2]Generally, claims filed prior to July 1, 1973, were filed with, adjudicated and paid by the Social Security Administration, 30 U.S.C. §§ 921-924. Claims filed after June 30, 1973, in which the miner was last employed in coal mining prior to January 1, 1970, or in which no coal mine operator or insurer is identified, are paid by the Black Lung Disability Trust Fund, 30 U.S.C. § 934. The Trust is funded by a producer tax, 26 U.S.C. §§ 4121, 9501.

[3]The Black Lung Benefits Act has changed substantially since its review by the Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976).

and in compliance with law, *See Old Ben Coal Co. v. Prewitt*, 755 F.2d 588, 589-90 (7th Cir. 1985).

Prior to appellate review, the parties are permitted to submit evidence in support of or in opposition to a claimant's assertion of entitlement. If medical issues are present, the parties will submit a variety of medical evidence.[4] Medical evidence is frequently dispositive and often in sharp conflict.

Certain medical evidence standing by itself may, by invoking a presumption of eligibility, serve to relieve the claimant of the burden of proving any other fact. Once the presumption invocation fact is proven, all ultimate facts necessary for entitlement are presumed.

The presumption in question is called the "interim presumption." In 1972, the Social Security Administration first adopted an "interim presumption" by regulation to be applied in its black lung claims, 20 C.F.R. § 410.490 (App. 163a). This regulation was not applicable to claims filed with the Labor Department, 20 C.F.R. Part 718.2 (1972), 37 Fed. Reg. 20615 (Sept. 30, 1972).

In amending the Act in 1977, Congress directed the Labor Secretary to develop new medical criteria for claims adjudications, but pending the development and issuance of these new criteria, the Labor Department was to adopt an "interim presumption" of its own which could "not be more restrictive than criteria applicable to a claim filed on June 30, 1973 . . . ." 30 U.S.C. § 902(f)(2). The Conference Committee cautioned the Secretary of Labor "in determining claims under such criteria, all relevant

[4]20 C.F.R. Part 718, Subpart B and Appendices A, B and C describe the nature of this evidence in detail.

medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register . . . ." H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978).

The Labor "interim presumption" was publishe August 18, 1978 at 20 C.F.R. § 727.203 (App. 156a). It is applicable in hundreds of thousands of claims, 30 U.S.C. § 945, 20 C.F.R. §§ 727.106-107.

B. The Instant Claims

The Labor interim presumption was applicable in all three cases, and all three were transferred to an ALJ for a hearing on the record and decision.

STAPLETON. In Stapleton's case, the record contained three chest x-ray reports, one of which found pneumoconiosis and two of which negated the presence of the disease. The ALJ found invocation of the Labor presumption on the basis of the single positive x-ray (App. 113a) 20 C.F.R. § 727.203(a)(1). The negative findings were not reviewed. The ALJ then found the presumption rebutted on several grounds and denied the claim. In so doing, the ALJ weighed the negative x-rays in his rebuttal inquiry.

Stapleton appealed to the Board. The Government argued in response that the presumption should not have been invoked because the ALJ found the preponderance of the x-ray evidence to be negative, albeit in his rebuttal inquiry. The Department reiterated its longstanding position that invocation by any method could be accomplished only after all relevant like-kind invocation evidence is weighed and the ALJ determines which of the reports are most reliable and credible.

The Board agreed with the Department and reversed the finding of x-ray invocation of the presumption but affirmed the denial of the claim as the ALJ's error was harmless (App. 104a).

Stapleton appealed to the Fourth Circuit arguing that the ALJ's invocation finding was correct but that the rebuttal finding was contrary to the Fourth Circuit's decision in *Hampton v. Benefits Review Board*, 678 F.2d 506 (4th Cir. 1982). *Hampton* held that otherwise reliable and credible medical opinion evidence, predicated in part on a physician's interpretation of objective pulmonary system test results, was incompetent rebuttal evidence as a matter of law. *See* note 8 *infra*.

RAY: Ray's case presents a variety of medical test results. The ALJ weighed the conflicting evidence in each invocation category. Finding that the weight of like-kind evidence in each category failed to establish any invoking fact by a preponderance, the ALJ denied access to the presumption and denied the claim (App. 133a).

On appeal, the Board found the ALJ's invocation fact determinations to have been supported by substantial evidence and affirmed (App. 124a). Ray appealed to the Fourth Circuit.

CORNETT:[5] Cornett's file also presented a variety of medical test evidence. The ALJ rejected each item not supporting invocation. The presumption was invoked (App. 146a). The ALJ found rebuttal evidence to be insufficient (App. 150a) and awarded benefits and prejudgment interest to Cornett.[6]

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[5]Cornett died on June 27, 1983 from arteriosclerosis. The entitlement of his surviving spouse continues on the basis of his claim, 30 U.S.C. § 932*(l)*.

[6]The award of prejudgment interest was also appealed to the Board and the Court of Appeals. The Court of Appeals en banc considered the question and unanimously reversed (App. 29a).

On appeal to the Board, Mullins argued that the ALJ did not weigh the evidence in the invocation inquiry, but simply rejected evidence unfavorable to Cornett for a variety of improper reasons. The Board affirmed per curiam (App. 138a) and denied Mullins' Motion for Reconsideration (App. 135a).

Mullins appealed to the Fourth Circuit. It argued that on invocation the ALJ had so inaccurately and irrationally reviewed the relevant evidence that the effect of the decisional process was to excuse the claimant from his burden of proving the veracity of an invocation fact by a preponderance of the evidence, as required by 5 U.S.C. § 556(d) and the Fourth Circuit's own holding in *Consolidation Coal Co. v. Sanati,* 713 F.2d 480, 484 (4th Cir. 1983), which adopted a preponderance standard for the consideration of invocation evidence.

C. Fourth Circuit Proceedings

On February 11, 1985, the Court of Appeals *on its own motion* consolidated the three cases for en banc review.[7] It certified questions to be addressed by the parties, which are summarized as follows:

1. Whether any single item of evidence invokes the presumption, notwithstanding the presence in the record of equally probative or more probative like-kind evidence?

2. Whether and to what extent medical test evidence of the sort which might be considered on invocation, i.e., objective test results, may be relied upon to support a rebuttal finding?

[7]A fourth case, *Left Fork Coal Co. v. Cole,* No. 84-1832 (4th Cir. 1986), was removed from the group at the request of counsel.

The Appeals Court directed the parties to address these matters in light of its holdings in *Hampton v. Benefits Review Board,* 678 F.2d 506, *Consolidation Coal Co. v. Sanati,* 713 F.2d 480, and *Whicker v. Benefits Review Board,* 733 F.2d 346 (4th Cir. 1984), which modified *Hampton.*

The Government intervened in all three cases to address these critical issues in black lung litigation. The Government argued that all invocation and rebuttal facts were to be resolved in light of all relevant and material evidence, and that each party seeking to prove any fact bore the burden of doing so by a preponderance of the evidence. The Government claimed deference for its interpretation of its regulation.

The purpose of the extraordinary procedure was, apparently, to afford the Fourth Circuit en banc an opportunity to review the rules of proof and evidence it would apply in Labor Department interim presumption claims.[8] No congressional or agency action prompted this effort.

On February 26, 1986, the Court issued its decision accompanied by four separate concurring and dissenting opinions. *Hampton, Whicker* and *Sanati* were overruled (App. 4a). One 7-4 majority held in summary:

> That the interim presumption is invoked on the presentation of any single item of invoking evi-

[8]The proceeding in the Court of Appeals marks the culmination of the Fourth Circuit's effort to arrive at a *rebuttal* rule for black lung presumptions. *See, e.g., Whicker v. Benefits Review Board,* 733 F.2d 346; *Hampton v. Benefits Review Board,* 678 F.2d 506. Invocation rules of proof had not previously been troublesome in the Fourth Circuit, and the Court had, in both Labor Department claims (*Consolidation Coal Co. v. Sanati,* 713 F.2d 480) and Social Secruity black lung claims (*Sharpless v. Califano,* 585 F.2d 664 (4th Cir. 1978), consistently applied a preponderance standard in invocation determinations.

> dence. Evidence unfavorable to the claimant is not weighed in the invocation inquiry. The preponderance rule does not apply.

A differently constituted 7-4 majority held in summary:

> All relevant evidence is considered and weighed in the rebuttal phase.

The denial of benefits to Stapleton was affirmed as the rebuttal finding of the ALJ was in accord with these holdings. The denial of Ray's claim was vacated and remanded as there were single items of invoking evidence in the record. The award in Cornett was affirmed as the single items of invoking evidence need not have been weighed under the Court's holding.

On the invocation question, not only is the result in conflict with other circuits and the views of the federal agencies which have responsibility for administering these claims, but the seven-judge majority in three separate opinions disagreed on the rationale for its unique holding.

A petition for rehearing on the invocation question only, filed by Mullins, Old Republic, and Jewell Ridge, was denied by a 6-4 majority of the Court of Appeals on April 21, 1986 (App. 152a). On the same date, a petition for rehearing filed by Stapleton on various factual aspects of his claim was unanimously denied (App. 154a).

REASONS FOR GRANTING THE WRIT

The Labor Department's interim presumption is key to establishing a claimant's entitlement to benefits in hundreds of thousands of cases. The Fourth Circuit's unique holding has, in effect, made the invocation of this presumption an *ex parte* phase of the proceeding. This holding conflicts with the meaning of Sections 7(c) and 12 of

the Administrative Procedure Act ("APA") and establishes a precedent which undermines the purpose of these provisions. It conflicts directly with decisions of the Sixth Circuit and in principle with decisions of this Court, the circuits, and the district courts. It will disrupt the ongoing litigation of thousands of claims and is likely to have enormous economic consequences for coal mine operators, their insurers, and the solvency of the Black Lung Disability Trust Fund. The rule adopted by the Court of Appeals is neither authorized by Congress nor justified by any source of law.

I. THERE IS A CLEAR CONFLICT IN THE CIRCUITS

After *Stapleton,* the Sixth Circuit in *Back v. Director, OWCP,* ____ F.2d ____, No. 85-3466 (6th Cir. July 15, 1986), expressly rejected the "any evidence" invocation rule of *Stapleton.*[9] The Sixth Circuit has further held that "the miner has the burden of establishing by a preponderance of the evidence all the facts necessary to invoke the interim presumption . . . ." *Engle v. Director, OWCP,* 792 F.2d 63, 64 n.1 (6th Cir. 1986).

Prior to *Stapleton,* the preinvocation weighing of relevant evidence and application of a preponderance standard to conflicting invocation evidence were uniformly accepted practices which rarely captured the attention of the circuits. *See Consolidation Coal Co. v. Chubb,* 741 F.2d 968, 973 (7th Cir. 1984); *Markus v. Old Ben Coal Co.,* 712 F.2d 322, 326-27 (7th Cir. 1983). *See also Evosevich v. Consolidation Coal Co.,* 789 F.2d 1021, 1023 (3d Cir. 1986).

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[9][T]his Court has rejected the plurality view of the Fourth Circuit in *Stapleton v. Westmoreland Coal Co.* . . . ." Slip op. at 7.

The circuit courts which have decided cases under the Social Security Administration's version of the interim presumption, 20 C.F.R. § 410.490 (App. 163a), acted similarly. The statutory connection between the two presumptions is clear (30 U.S.C. § 902(f)(2)) and the invocation language of the two is, for these purposes, identical.[10] In SSA cases, the circuits, including the Fourth Circuit, uniformly held that invocation may not be accomplished without a weighing of the like-kind evidence and a determination that an invocation fact is established by a preponderance. *See, e.g., Elkins v. Secretary of HHS,* 658 F.2d 437, 439 (6th Cir. 1981); *Vintson v. Califano,* 592 F.2d 1353, 1356-58 (5th Cir. 1979); *Sharpless v. Califano,* 585 F.2d at 666. A multitude of district court decisions dating to 1974 are in accord.

The Labor and SSA versions are *in pari materia,* and for these purposes, the SSA decisions cited are indistinguishable.

This Court's supervisory powers should be exercised to restore consistency in black lung claim litigation and to eliminate the confusion produced by the Fourth Circuit's holding.

[10]The alternative methods for invocation offered in the Labor version were not available under the Social Security version. (*Compare* App. 157a *with* App. 164a.)

II. THE DECISION RAISES IMPORTANT QUESTIONS CONCERNING THE ADMINISTRATIVE PROCEDURE ACT'S RULE AGAINST SUPERSEDURE AND A PARTY'S RIGHT TO RESPOND TO EVIDENCE IN AN APA PROCEEDING UNDER THE BLACK LUNG BENEFITS ACT

The applicability of the "on the record" hearing provisions of the Administrative Procedure Act ("APA") in claims is not in dispute. 33 U.S.C. § 919(d). This Court has repeatedly held that the procedural safeguards of the APA may not be abrogated in keeping with the express language of Section 12 of the APA, 5 U.S.C. § 559, by courts or agencies, absent clear language or supersedure. *Rusk v. Cort,* 369 U.S. 367, 379 (1962); *Brownell v. We Shung,* 352 U.S. 180, 185 (1956); *Wong Yang Sung v. McGrath,* 339 U.S. 33, 47-52 (1950). The framers of the APA plainly so intended. *Legislative History of the Administrative Procedure Act,* 79th Cong., 2d Sess. 414 (1946) (Appendix to the Attorney General's Statement). More recently, the circuit courts have continued this strict construction of 5 U.S.C. § 559.[11] Section 12 also provides "privileges relating to evidence and procedure apply equally to agencies and persons . . . ."

Section 7(c) of the APA, 5 U.S.C. § 556(d), imposes a preponderance of the evidence burden of proof on the proponent of a rule, order or sanction. *Steadman v. Securities and Exchange Commission,* 450 U.S. 91, 100-01 (1981). Similarly, no rule, order or sanction may issue except on consideration of the whole record and unless it is

[11]*See Gott v. Walters,* 756 F.2d 902, 913 n.11 (D.C. Cir. 1985); *Association of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System,* 745 F.2d 677, 686 (D.C. Cir. 1984); *Steere Tank Lines, Inc. v. ICC,* 714 F.2d 1300, 1310 (5th Cir. 1983).

"supported by and in accordance with the reliable, pro bative and substantial evidence." 5 U.S.C. § 556(d). The terms "rule," "order" and "sanction" are defined in 5 U.S.C. § 551(4), (6) and (10) to include all or part of an agency action. *See also* 5 U.S.C. § 551(7), (11) and (13). Senator McCarran, a sponsor of the APA, noted that the "any evidence" approach to fact-finding previously employed by agencies and by courts in the review of administrative decisions was no longer acceptable. 92 Cong. Rec. 2148, 2157 n.7 (Mar. 12, 1946).

The black lung claimant is indisputably the proponent of invocation of the presumption and invocation plainly imposes a significant sanction on claim defendants. *See* text at 15-16 *infra*.

The Fourth Circuit has now held that, whenever the record presents any evidence of invocation, the presumption is invoked notwithstanding the presence of more credible, more reliable or more substantial evidence which proves that invocation should not occur. The preponderance standard simply no longer applies. Rules of evidence and procedure are not applied equally. There is no effective right of cross-examination in the invocation phase. By this ruling, the Fourth Circuit has created a phenomenon which, petitioners believe, is unknown in federal civil litigation in the United States – an offer of proof of material fact which cannot be refuted, must be accepted by the trier of fact and is not, in effect, subject to appellate review. Indeed, a circuit court's statutory jurisdiction to conduct a substantial evidence review of all findings of fact presented on appeal, 33 U.S.C. § 921(c), is ousted with respect to invocation facts by *Stapleton*. *See Steadman v. Securities and Exchange Commission*, 450 U.S. at 96 n.13.

There is no express reference or supersedure or clear and convincing evidence of congressional intent which may even arguably be said expressly to override the preponderance rule. The Fourth Circuit's reliance for this purpose on the actions of congressional staff (App. 63a, 66a, 73a, 81a), the liberal intent of individual legislators (App. 75a, 82a), a law review article (App. 76a-81a) and ambiguous commentary published in the Federal Register (App. 94a-96a) which is not a part of any regulation, is not consistent with either the language or purpose of 5 U.S.C. § 559. The Fourth Circuit's rule departs substantially from the meaning accorded 5 U.S.C. § 559 by this Court and, in so doing, diminishes the procedural rights conferred by the APA to the detriment of claim defendants only. This is a matter worthy of this Court's attention.

The Fourth Circuit's application of its rule to intermediate fact-finding only lends little support to the holding. The interim presumption, like the presumption reviewed by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), is easy to invoke and quite difficult to rebut. *See, e.g., Wilson v. Benefits Review Board*, 748 F.2d 198 (4th Cir. 1984); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123 (4th Cir. 1984) (rebuttal proof must "rule out" presumed facts). (*See* App. 23a.) The facts which support invocation are not the same as the factual circumstances which must be addressed on rebuttal (App. 156a-158a). Proof of the intermediate facts necessary to invoke the interim presumption sharpens the inquiry on the ultimate facts which define entitlement in the rebuttal phase. But unlike the setting in *Burdine*, after invocation of the interim presumption, the ultimate burden of persuasion shifts to and stays with the claim defendant. *See, e.g., Amax Coal Co. v. Director, OWCP*, 772 F.2d 304, 305 (7th Cir. 1985) (and cases cited therein).

Thus, the interim presumption serves not only to establish a prima facie case within the context of a legally mandated presumption, *Burdine*, 450 U.S. at 1094 n.7, but it goes on to permanently allocate the burdens of proof and persuasion to claim defendants.

There is no indication anywhere of agency or congressional intent to impose this substantial burden by pretext or by insubstantial or unreliable evidence. Where intermediate fact-finding may so benefit the proponent that he is excused from carrying any proof burden and, in turn, imposes so significant a sanction on the defending party, fairness requires that traditional procedures be employed to ensure that the intermediate fact is supported by the record. Sections 7(c) and 12 of the APA were designed and intended to guarantee this result. *See also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613-14 nn.6-7 (1982). This Court sustained the validity of the statutory black lung presumptions in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27-37 (1976), in large part because their structure preserved the claim defendant's rights to answer evidence in all respects. A like result is surely proper under the interim presumption.

Most importantly, for almost 14 years in approximately 800,000[12] claims the two agencies which drafted and administered the presumption applied its invocation provision under a preponderance of the evidence rule, actively advocated this standard in the courts, and gained its acceptance. Through the course of innumerable congressional hearings and five major amendatory enactments from 1972-1981, the Government was not instructed to act otherwise. The Act itself provides:

> In determining the validity of claims under this part, all relevant evidence shall be considered, . . . *where relevant* . . . .

30 U.S.C. § 923(b) (emphasis added).

The regulation is compatible by requiring that an invoking fact be "established," 20 C.F.R. § 727.203(a), and by requiring consideration of all relevant medical evidence in the entire "subpart" in which § 727.203 appears, 20 C.F.R. § 727.203(b). The Labor Department's consistent interpretation of its longstanding and well-known evidentiary rule on which claim parties have relied for many years is justified and deserves vindication by this Court. *See N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 402 (1983).

III. THE HOLDING WILL HAVE A DECISIVE IMPACT ON THOUSANDS OF CLAIMS IN THE FOURTH CIRCUIT

The interim presumption is, as its name implies, not a permanent rule. It has expired for new claims filed on or after April 1, 1980, 20 C.F.R. §§ 718.1, 718.2. Many thousands of interim presumption claims, however, remain in administrative litigation. In fact, no claim involving the eligibility rules applicable after March 31, 1980 has reached a circuit court.

Unpublished caseload reports prepared by the Benefits Review Board and the Department of Labor's Office of Administrative Law Judges show that, as of July 31, 1986,

[12] *See: Hearings on Problems Relating to the Insolvency of the Black Lung Disability Trust Fund Before the Subcomm. on Oversight of the House Comm. on Ways and Means. Serial 97-32, 97th Cong., 1st Sess. 3, 17, 81-109 (testimony of Morton Henig, U.S. General Accounting Office; testimony of Sam Church, United Mine Workers of America).*

there are 5,482 pending cases before the Board[13] and 20,247 pending claims before ALJs. An additional volume of interim presumption claims, probably numbering in the thousands, remains in the Labor Department. Counsel's review of hundreds of Old Republic's individual claims pending at the Board reveals that approximately 86.5% are subject to the interim presumption and that approximately 13.3% of those are appeals by claimants from benefit denials in which the presumption was not invoked because the preponderance of the evidence failed to establish invocation. In all of these, the majority rule of *Stapleton* would require reversal or remand for a new trial if they arose in the Fourth Circuit. The Board has reported the identification of at least 110 claims arising in the Fourth Circuit clearly requiring remand or retrial and there are surely many more to follow. The Fourth Circuit has thus far remanded at least five claims from its own inventory. *See, e.g., Haynes v. Jewell Ridge Coal Corp.*, 790 F.2d 1113 (4th Cir. 1986); *Lagamba v. Consolidation Coal Co.*, 787 F.2d 172 (4th Cir. 1986).[14] It is believed that many, probably the majority, of the claims pending before ALJs also involve the interim presumption.

[13]The huge backlog of pending Board claims, the vast majority of which are black lung cases, prompted Congress to increase the size of the Board from 3 to 5 permanent and 4 temporary members in 1984. H.R. Rep. No. 1027, 98th Cong., 2d Sess. 33-34 (1984). The huge ALJ backlog prompted a special appropriation of funds to the Office of Administrative Law Judges in 1985.

[14]The Department of Labor has an inventory of from 50,000 to 100,000 denied interim presumption claims which are inactive. *Stapleton* would provide sufficient cause for reactivation in some of these under 33 U.S.C. § 922, as incorporated by reference into 30 U.S.C. § 932(a), and this Court's decision in *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

It is of no less concern from an insurance carrier's or mine operator's point of view that in reasonable reliance on the longstanding application of the preponderance rule in the invocation phase, many claims were defended primarily with a view toward proving noninvocation of the presumption. Proof of noninvocation typically cannot be relied upon to prove ultimate rebuttal facts. For this reason, in cases arising within the jurisdiction of the Fourth Circuit, a claim defendant's expectation that the existing record will be adequate for the defense of the claim after closure of the record or on appeal will most often be unjustified and thousands of claims already successfully defended are in jeopardy of reversal.

The average cost of a single black lung claim has been estimated by the Department of Labor to range from $118,315.88 in the case of an unmarried miner to $185,656.69 in the case of a married miner. U.S. Department of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act*, 32 (1981).

The Fourth Circuit's decision will, without question, produce a significant volume of relitigation. The re-invention of the most commonly applied eligiblity provision of the Black Lung Benefits Act will, of necessity, cause confusion in the claims litigation process in the Fourth Circuit and elsewhere, which may be avoided through an exercise of this Court's powers of supervision.

In enacting the Black Lung Benefits Act, Congress intended to establish a process by which hundreds of thousands of miners could assert their claims and mine owners and their insurers would have a fair opportunity to defend questionable claims. As frequent amendatory activity demonstrates, the integrity of this program is of great importance to Congress. For many years, federal courts and

administrative agencies have agreed upon the evidentiary standards applicable to key medical presumptions. The Fourth Circuit has strayed from this steady course. Thousands of claims and hundreds of millions of dollars are at stake. Miners and employers in Virginia or West Virginia should not, at this late date, face a different claims process than miners and employers in Ohio or Kentucky.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 29, 1986

86-327

No.

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY and JEWELL RIDGE COAL CORPORATION,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. ST. LETON AND WESTMORELAND COAL COMPANY,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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FOR THE FOURTH CIRCUIT

No. 83-2193 (L)

Gerald Stapleton,

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versus

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Respondent,

Director, Office of Workers' Compensation Programs, U.S. Department of Labor, Benefits Review Board,

Intervenor.

No. 84-1520

Luke R. Ray,

Petitioner,

versus

Jewel Ridge Coal Corporation and Director, Office of Workers' Compensation Programs, United States Department of Labor,

Respondents.

Director, Office of Workers' Compensation Program,

Intervenor.

No. 84-1528

Mullins Coal Company, Inc., of Virginia, and Old Republic Industries,

Petitioners,

versus

Glenn Cornett and Director, Office of Workers' Compensation Programs, United States Department of Labor,

Respondents.

On Petition for Review of Orders of the United States Department of Labor.

Argued: April 2, 1985 Decided: February 26, 1986

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, WILKINSON, and SNEEDEN, Circuit Judges.

Mark E. Solomons; C. Randall Lowe; S. Strother Smith (Yeary & Tate, P.C. on brief) for Petitioner; Hugh P. Cline; David A. Barnett; J. Michael O'Neill (Michael F. Blair on brief) for Respondent.

PER CURIAM:

Gerald L. Stapleton and Luke R. Ray appeal decisions by the Benefits Review Board (BRB) denying black lung benefits. Mullins Coal Company appeals a decision of the BRB granting black lung benefits to Glenn Cornett. These cases each involved the interim presumption and its rebuttal under 20 C.F.R. § 727.203 and where consolidated for the purpose of appeal.

For the reasons variously expressed in the opinions of Judges Hall, Sprouse, and Widener (which opinions, one or others, are joined by Chief Judge Winter and Judges Chapman, Wilkinson and Sneeden), we hold that the interim presumption under § 727.203(a)(1), (2), or (3) is established when there is credible evidence that a qualifying X-ray indicates the presence of pneumoconiosis, a single qualifying set of ventilatory studies indicates, pursuant to the regulatory standard, a chronic respiratory or pulmonary disease, or a single qualifying set of blood gas studies indicates, pursuant to the regulatory standard, an impairment in the transfer of oxygen from the lungs to the blood.

For the reasons variously expressed in the opinions of Judges Hall, Sprouse, and Widener (which opinions, one or others, are joined by Chief Judge Winter and Judges Chapman, Wilkinson and Sneeden), we hold that the interim presumption under § (a)(4) is established by one qualifying physician's opinion, i.e., one which meets the regulations' requirements.

For reasons variously expressed in the opinions of Judges Phillips and Widener (which opinions, one or the other, are joined by Judges Russell, Murnaghan, Ervin, Chapman, and Wilkinson), we hold that, absent a qualifying physician's opinion, the interim presumption under (a)(4) is established by weighing, under the customary rules of evidence (which require the facts upon which a presumption is based to be proven by a preponderance of the evidence), the "other medical evidence," i.e., medical evidence other than X-rays, ventilatory studies, and blood gas studies.

For the reasons variously expressed in the opinions of Judges Phillips and Widener (which opinions, one or the

other, are joined by Judges Russell, Murnaghan, Ervin, Chapman, and Wilkinson), we hold that, when considering under 20 C.F.R. § 727.203(b) the rebuttal of a presumption established under § (a), *all relevant medical evidence* must be considered and weighed, including, but not exclusivley, nonqualifying X-rays, test results, and opinions, regardless of the section under which the presumption was invoked. This consideration is limited only by the single X-ray statute, 30 U.S.C. § 923(b) (a claim may not be denied solely on the basis of one negative chest X-ray).

For the reasons variously expressed in the opinions of Judges Hall, Sprouse, and Widener (which opinions, one or others, are joined by Chief Judge Winter and Judges Chapman, Wilkinson and Sneeden), *Consoldiated Coal Company v. Sanati,* 713 F.2d 480 (4th Cir. 1983), is overruled insofar as it holds that one qualifying physician's opinion does not necessarily invoke the presumption, but, for the reasons expressed in the opinions of Judges Phillips and Widener (which opinions, one or the other, are joined by Judges Russell, Murnaghan, Ervin, Chapman, and Wilkinson), its reasoning remains the law in this circuit in considering whether or not the presumption is established under (a)(4) in the absence of a qualifying physician's opinion.

For the reasons variously expressed in the opinions of Judges Phillips and Widener (which opinions, one or the other, are joined by Judges Russell, Murnaghan, Ervin, Chapman, and Wilkinson), we hold that *Whicker v. United States Department of Labor Benefits Review Board,* 733 F.2d 346 (4th Cir. 1984), and *Hampton v. United Staes Department of Labor Benefits Review Board,* 678 F.2d 506 (4th Cir. 1982) (per curiam), are overruled.

For the reasons expressed in part IIIB of Judge Hall's opinion (which is joined by all of the judges), we hold that interest on an award of black lung benefits shall accrue only from thirty days after the first agency decision awarding benefits.

Accordingly, our decision in each of the three consolidated cases is as follows:

Gerald L. Stapleton:	The ALJ properly invoked the interim presumption and correctly found it rebutted. Stapleton's claim for benefits was properly denied. We affirm.
Luke R. Ray:	The ALJ should have invoked the interim presumption. The BRB's decision is vacated, and Ray's claim is remanded for a determination of whether or not the presumption is rebutted.
Mullins Coal Company:	The ALJ properly invoked the interim presumption and found it unrebutted. We affirm the award of benefits to Glenn Cornett. We remand, however, for a calculation of interest on his benefits in accordance with this opinion.

HALL, Circuit Judge:

I.

Introduction

These three black lung cases were consolidated for en banc review, because they each involve a common legal issue, concerning the type and quantum of proof necessary to trigger and rebut the interim presumption of pneumo-

coniosis under 20 C.F.R. § 727.203, and because our past panel decisions in this area have been contradictory and confusing.[1] The regulation at issue states in pertinent part as follows:

> § 727.203 **Interim presumption**
>
> (a) **Establishing interim presumption.** A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis . . . ;
>
> (2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than [certain values specified in the regulation's tables];
>
> (3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than [certain values specified in the regulation's tables];

[1] *See, e.g.*, Whicker v. U.S. Dept. of Labor Benefits Review Board, 733 F.2d 346 (4th Cir. 1984), Consolidation Coal Co. v. Sanati, 713 F.2d 480 (4th Cir. 1983), and Hampton v. U.S. Dept. of Labor Benefits Review Board, 678 F.2d 506 (4th Cir. 1982).

> (4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment; . . .
>
> (b) **Rebuttal of interim presumption.** In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:
>
> (1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work . . .; or
>
> (2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work . . .; or
>
> (3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or
>
> (4) The evidence establishes that the miner does not, or did not, have pneumoconisis.

II.

Factual Background

A. Stapleton

Stapleton was forty-three years old in 1980 when his claim for black lung benefits was heard by an Administrative Law Judge ("ALJ"). Stapleton had worked in coal mines for at least fifteen to sixteen years and was last employed by respondent, Westmoreland Coal Company ("Westmoreland"), from May, 1969, until June, 1972. At that time, he stopped working as a result of breathing difficulties and heart problems.

A 1973 x-ray noted minimal pneumonitis but otherwise clear lungs. An x-ray read by Dr. Shiv Navani, a B reader,[2] on November 30, 1976, indicated an increase in small nodular and linear densities throughout the lungs consistent with changes of coal worker's pneumoconiosis. Another x-ray dated January 21, 1980, was read by Dr. John G. Byers, a B reader, who concluded there was "essentially" no evidence of pneumoconiosis. This x-ray was re-read by Dr. Paul Francke, also a B reader, on July 24, 1980. Dr. Francke found no x-ray evidence of pneumoconiosis.

There were two pulmonary function studies received into the record. A 1976 study showed qualifying values, i.e. values below the maximum values specified in the regulation, but noted poor effort on the part of Stapleton. A 1980 study reflected non-qualifying values, i.e. values above the maximum, and likewise indicated poor effort and cooperation.

Also introduced into the record were two arterial blood gas studies, one performed in 1976 and another conducted in 1980. The results of both studies were above the regulation's maximum values and were, therefore, non-qualifying.

In addition, the evidence included medical reports of various physicians. In a report dated March, 1973, Anthony F. Leger, M.D., one of Stapleton's treating physicians, stated that claimant suffers from sinus tachycardia (rapid heart beat) and was hospitalized in July, 1972,

[2]A "B" reader is a physician who has completed a course and passed a proficiency examination conducted by the National Institute for Occupational Safety and Health for reading pneumoconiosis on x-ray films.

because of his heart disorder. Dr. Leger also noted that Stapleton had been hospitalized in Norton, Virginia, in December, 1970, when he developed acute back pain while lifting a heavy object. There is no reference in Dr. Leger's records to any pulmonary or respiratory difficulty.

In a letter dated June 23, 1973, Daniel Gabrield, M.D., Stapleton's regular treating physician, wrote to claimant's counsel as follows:

> I wish I could give you a more favorable report.
>
> I first saw Mr. Stapleton in June, 1972 with chief complaint of shortness of breath, chest pain and rapid heart. At my insistence, he quit working because of his heart condition.
>
> In my letter to you of 1972 concerning his low back injury in 1970, it did not disable him for work as you know he was working. I have no records of this condition other than his statement.

Dr. S.K. Paranthaman, who examined the claimant in 1976 at the request of the United States Department of Labor, found that Stapleton had evidence of pneumoconiosis and possible bronchitis. Dr. Paranthaman noted, however, that claimant's respiratory impairment was moderate and that "the functional impairment appears to be primarily from cardiac condition and back pain."

Stapleton was also exmained in April, 1980, by Dr. John G. Byers, who concluded that there was not sufficient evidence to justify a diagnosis of pneumoconiosis. According to Dr. Byers, claimant had "no significant pure respiratory symptoms other than dyspnea," which the physician attributed to Stapleton's cardiac disease. Dr. Byers further stated that:

> Disability is difficult to evaluate in this

gentleman's case. His respiratory impairment is not fully evaluated because of his poor co-operation on pulmonary function testing. Certainly the best curve that he was able to give us would not indicate significant respiratory impairment. There is an abnormality of arterial blood gases which is not fully explained and which might be associated with dyspnea on moderate exertion. I am attributing his abnormality to temporary factors associated with his heart rate of 160 beats per minute caused by his cardiac disease. Note that several years ago PO_2 was in the normal range on another test. I think this patient has significant disability based on neurosis, and he probably has significant disability based on his cardiac disease which is not yet in control on his Inderal. . . . As noted above, I feel that this patient's primary impairment is cardiac in nature with a strong component of cardiac neurosis.

A report, dated June 30, 1980, was submitted by Dr. George O. Kress, a specialist in industrial pulmonary medicine. Dr. Kress, a non-examining physician, reviewed the record and concluded that Stapleton did not suffer from pneumoconiosis, or from any significant respiratory problems. According to Dr. Kress, problems unrelated to claimant's coal mine employment probably precluded his ability to do work requiring significant effort.

Based on this evidence, the ALJ invoked the interim presumption under 20 C.F.R. § 727.203(a)(1), citing Dr. Navani's positive x-ray, but concluded that the presumption was adequately rebutted by other medical evidence under 20 C.F.R. § 727.203(b)(4), which included the more recent negative x-ray report of Dr. Byers. The ALJ also concluded that no other evidence qualified Stapleton as disabled due to a respiratory or pulmonary impairment.

The one set of positive ventilatory studies was discounted because of poor cooperation. The ALJ, therefore, denied benefits. In reviewing this decision, the Board concluded that, although the ultimate decision denying benefits was correct, the ALJ had improperly invoked the presumption on the basis of the one positive x-ray.

B. **Ray**

Ray is a forty-seven-year-old former coal miner who had sixteen years of coal mining employment when he quit working in 1973 due to stomach problems. Ten x-rays, six ventilatory studies, and six medical reports were introduced at the hearing on his claim for black lung benefits.

Among the x-ray reports was one in 1974 which was postive for pneumoconiosis but which was submitted by an unidentified reader with an illegible signature. A 1977 x-ray was interpreted as positive by one radiologist. The most recent x-ray in 1980 showed a "suspicion" of pneumoconiosis. All of the remaining x-rays were negative.

Two of the six doctors' reports showed pulmonary disability, but these were not given great weight by the ALJ because they failed to conclude definitively that the disability was from exposure to coal dust. One doctor reported in 1975 that it was "probably" due to coal dust. Another physician concluded in 1980 that it was due to cigarette smoking. A third doctor found Ray totally disabled in 1977; however, the blood gas and ventilatory studies performed by this physician were normal. Ray's treating physician diagnosed anxiety neurosis and chronic gastritis and stated in a letter dated July, 1979, "[a]s far as his pulmonary complaints are concerned, I think they are rather insignificant."

There were two positive ventilatory studies. The ALJ, however, found them to be outweighed by more recent negative studies. The ALJ, concluding that the presumption had not been triggered, denied benefits, and the Board affirmed.

C. Mullins

Cornett, who was employed in coal mines for approximately thirty-six years, worked for Mullins from June, 1967, to April 30, 1976. In 1977, claimant suffered a heart attack. At that time his family physician, L.J. Fleenor, M.D., informed him he was suffering from black lung disease. Claimant tried to return to his coal mine employment, but suffered from shortness of breath and coughing. In less than a year, he completely ceased work at the coal mine and began to work at his family's hardware store.

The medical evidence, introduced in connection with Cornett's claim for black lung benefits, included both positive and negative x-rays, as well as qualifying and non-qualifying ventilatory and blood gas studies. In addition, there were conflicting opinions of two physicians. Dr. Fleenor submitted a report, dated February, 1979, in which he diagnosed black lung disease. Robert A. Abernathy, M.D., a specialist in internal medicine, examined Cornett in January, 1980, and concluded that his "major problem appears to be related chiefly to his hypertension and to his heart disease." Dr. Abernathy recognized that Cornett "does appear to have some pulmonary impairment" and was precluded from returning to coal mining work; however, in a supplemental report dated August 1, 1980, Dr. Abernathy expressed his belief that claimant's breathing problems were related not to his exposure to

coal dust but to his hypertension, cardiovascular impairments, and possibly smoking.

Following the administrative hearing on Cornett's claim, the ALJ found that claimant was entitled to invoke the presumption under 20 C.F.R. § 727.203(a)(1), (a)(2), and (a)(3). As for rebuttal, the ALJ concluded that:

> the medical evidence consisting of Claimant's ventilatory studies, blood-gas tests, and Dr. Abernathy's opinion that the Claimant is substantially precluded from doing any work beyond what he appears to be doing at the hardware store overwhelming [sic] establishes a respiratory impairment that causes Claimant to be incapable of performing his usual or comparable work . . . .
>
> Dr. Fleenor also diagnoses cardiovascular disease in addition to category 1 pneumoconiosis and he attributed Claimant's disability to both impairments. Testimonial evidence has established that Dr. Fleenor is Claimant's treating physician. Further, there is no indication that Dr. Abernathy has examined the Claimant more than once. Therefore, Dr. Fleenor's opinion may be given greater weight than that of a physician who has examined the Claimant on only one occasion.

The ALJ awarded benefits, and also awarded interest at a rate of six percent per year to commence as of July, 1978, the date of claimant's eligibility. The Board affirmed.[3]

---

[3]The brief submitted by Mullins in this appeal informs us that Cornett died on June 22, 1983, from acute congestive heart failure.

III.

Discussion

In our order setting these three appeals for en banc argument, the parties were requested to address the following issues:

> (1) Whether, despite the evidence of negative or non-qualifying x-rays, ventilatory studies, blood gas studies, and/or physicians' opinions, the interim presumption of pneumoconiosis under 20 C.F.R. § 727.203(a) is automatically triggered by any one of the following:
>
> (a) one positive x-ray;
>
> (b) one set of positive ventilatory studies;
>
> (c) one set of positive blood gas studies;
>
> (d) one physician's opinion.
>
> (2) Once the interim presumption of pneumoconiosis is triggered, whether and to what extent is non-qualifying medical evidence permitted to rebut the presumption under 20 C.F.R. § 727.203(b).

In addition to these common issues, the Court must consider in *Mullins* whether it is proper in black lung cases to award interest to a claimant on past due benefits from the date he is eligible for payment rather than from the time a favorable decision is issued.

In Section III. A. of this opinion, I will address first the issues concerning the interim presumption. I am authorized to state that Chief Judge Winter, Judge Sprouse, and Judge Sneeden join me in Section III. A. Section III. B. sets forth the Court's unanimous opinion concerning the pre-judgment interest issue raised in *Mullins*.

A. Interim Presumption

Black lung disease, or pneumoconiosis, is a severe and frequently crippling chronic respiratory impairment which is caused by long-term inhalation of coal mine dust. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6-7 (1976). The federal black lung program was enacted to provide benefits for total disability due to black lung disease. The program was originally enacted in Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969). The program has been amended on three occasions: Black Lung Benefits Amendments of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) (the "1972 amendments"); Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1977) and Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1977), signed into law on March 1, 1978 (the "1978 amendments"); and Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643 (1981) (the "1981 amendments").

The responsibility for adjudicating claims has shifted from the Social Security Administration (the "SSA") to the Department of Labor (the "DOL"). The 1972 amendments provided that claims filed on or before June 30, 1973 (Part "B" claims) would be adjudicated by SSA. *See generally* 20 C.F.R. Part 410. Claims filed after that date (Part "C" claims) would be adjudicated by DOL. Under this system, Part "C" claimants were subjected to more restrictive eligibility criteria than Part "B" claimants. The 1978 amendments, however, eliminated the restrictive standards applicable to Part-"C" claims, liberalized the statutory eligibility criteria, and authorized the Secretary of Labor to adopt new criteria which were no more restrictive than the eligibility standards governing Part "B" claims. 30 U.S.C. § 902(f)(2). In accordance with this intent and pur-

suant to 30 U.S.C. § 902(f),[4] the Secretary promulgated interim criteria at 20 C.F.R. § 727.200 *et seq.*, including

[4]30 U.S.C. § 902(f) provides as follows:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for Claims under Part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that –
>
> (A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time.
>
> (B) Such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;
>
> (C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and
>
> (D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).
>
> (2) Criteria applied by the Secretary of Labor in the case of –
>
> (A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;
>
> (B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and
>
> (C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;
>
> shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

the presumption at issue in these appeals at § 727.203,[5] which is set out in full in the Introduction to this opinion.

The employers in each case, as well as the Director of the Office of Workers' Compensation Programs ("Director"), whom we permitted to intervene in these appeals, contend that the regulation at 20 C.F.R. § 727.203(a) requires the ALJ to weigh all evidence, both positive and negative, before invoking the interim presumption. Under this view, the presumption is triggered only if there is a preponderance of like-kind positive evidence. According to the employers and the Director, the presumption is not triggered by a single positive x-ray, ventilatory or blood gas test, or by one physician's opinion, unless that single piece of evidence stands uncontradicted by like-kind evidence. I cannot agree. Although, as the opinion of Judge Phillips indicates, the Director's view on this issue is, if reasonable, entitled to judicial deference, I find that the agency's interpretation renders the regulation internally inconsistent and is plainly erroneous. Moreover, I concluded

[5]Permanent criteria, applicable to claims filed after March 31, 1980, are contained at 20 C.F.R. Part 718.

that the agency's interpretation conflicts with congressional intent.

Legal presumptions, such as the one at issue in these appeals, are encountered in a variety of civil, criminal and administrative settings. A presumption is raised by a basic fact or facts which, when accepted as true by the factfinder, give rise to a mandatory inference called a presumed fact. Graham C. Lilly, *An Introduction to the Law of Evidence,* Chapter III, at 49 (1978). "Once the basic [fact or] facts are believed, the resulting presumed fact must be accepted by the trier *unless* it is rebutted by contravening evidence." *Id.*

The initial burden of meeting the factual prerequisite for triggering a presumption is distinct from the *ultimate* burden of convincing the factfinder of the existence of all the essential elements of a claim or defense. Meeting the initial burden, however, has the effect of shifting the burden of persuasion, or at least the burden of coming forward with rebuttal evidence, onto the opposing party. *Id.* at 49, 54-58.

With these principles in mind, I have examined the statutory and regulatory scheme of the presumption at issue in these appeals. At the outset I note that Congress has mandated that in deciding black lung claims all relevant evidence be considered:

> In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical testes such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tsets, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a

> deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials.

30 U.S.C. § 923(b).

The Conference Report, accompanying the 1978 amendments, states that:

> With respect to a claim filed or pending prior to the promulgation of such [new] regulations such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standads prescribed by the Secretary of Labor and published in the Federal Register.

H.R. Rep. No. 864, 95th Cong., 2d Sess., reprinted in [1978] U.S. Code Cong. & Ad. News 308, 309. As pointed out in an article analyzing the legislative history of the interim presumption, "[b]y this [Conference Report] statement, the conferees alerted the Secretary of Labor that he was not to treat the interim presumption as irrebuttable." Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues,* 83 W.VA.L.REV. 869, 893 (1981). Thus, by statute, the disposition of a black lung claim must be based on all relevant evidence and the presumption which the Secretary was directed to promulgate must be rebuttable. The statute, however, leaves to the Secretary how the presumption is to be triggered and rebutted and how the various burdens of persuasion and production are to be allocated between the claimant and the employer.

The regulation promulgated by the Secretary is divided

into two parts. The first part, Part (a), enumerates four distinct medical requirements which, if met, "establish" the interim presumption. The second part of the regulation, Part (b), addresses the requirements for rebutting a presumption which has been established under Part (a). Part (a) *by its own terms* calls for the presumption to be triggered under (a)(1) by "[a] chest roentgenogram (x-ray)," and under (a)(4) if "[o]ther medical evidence, including the documented opinion of *a* physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment" (emphasis added). Thus, with respect to these two medical requirements, I can only conclude that a single qualifying x-ray or a single physician's opinion that a claimant has a disabling pulmonary impairment will clearly suffice to trigger the presumption. Of course, certain minimal requirements of reliability and authenticity must be met, including identification of the physician reading the x-ray or rendering the opinion, the date of the report, and compliance with any applicable quality standards for x-rays found elsewhere in the regulations. *See* 20 C.F.R. §§ 727.206(a), 718.102, 718.104, 410.428.

Concerning the medical requirements under §727.203 (a)(2) and (a)(3), the regulation employs the terms "ventilatory studies" and "blood gas studies" in the plural. Nevertheless, I conclude that a reasonable interpretation of this language requires the presumption to be triggered if the results of one set of ventilatory or blood gas studies demonstrate values above those listed in the tables.[6] I note that this interpretation is fully supported by the regulations which define how ventilatory and blood gas tests are

[6]As with x-ray evidence, ventilatory and blood gas studies must also comply with applicable quality standards. See 20 C.F.R. §§ 206(a), 718.103, 718.105, 410.430.

to be conducted. These regulations demonstrate that each pulmonary function study consists of several tests and must be accompanied by two to three tracings of each test performed. 20 C.F.R. § 718.103; 410.430. Similarly, a blood gas study may also have separate components, one reflecting the results obtained at rest, and the other reporting the results of testing during exercise. 20 C.F.R. § 718.105.

Certainly, I find nothing in Part (a) of the regulation which permits – much less requires – the weighing of conflicting like-kind evidence by the factfinder before triggering the presumption. In fact, the view espoused by the Director that all evidence must be weighed before invoking the presumption renders the rebuttal phase of the inquiry superfluous. Judge Phillips' opinion, in finding the Director's position on this point reasonable, effectively rewrites the rebuttal portion of the regulation and makes the presumption once triggered, at least in part, irrebuttable.[7] This interpretation, which renders the regulation internally inconsistent and contradictory, cannot withstand the test of reasonableness under any conceivable criteria. Moreover, insofar as it makes the presumption irrebuttable, it clearly conflicts with congressional intent.

[7]According to the construction offered in Judge Phillips' opinion, once the evidence is weighed and the presumption is triggered, it may be rebutted under § 727.203(b)(1)-(4) *unless* it was triggered by proof under § 727.203(a)(4) that the claimant had a totally disabling respiratory or pulmonary impairment or *unless* it was invoked by proof under § 727.203(a)(1) that the claimant has pneumoconiosis. the word "unless" appears nowhere in the regulation. Similarly, under Judge Phillips' view, invocation of the presumption *conclusively*, i.e. irrebuttably establishes that the claimant has pneumoconiosis under § 727.203(a)(1), has certain levels of respiratory or pulmonary impairment under (a)(2) or (a)(3), and is totally disabled by a respiratory or pulmonary impairment under (a)(4).

I would accordingly overrule our previous decision in *Consolidation Coal Co. v. Sanati*, 713 F.2d 480 (4th Cir. 1983), which held that the ALJ must weigh conflicting evidence before determining whether the presumption has been triggered. I would hold instead that under the plain meaning of 20 C.F.R. § 727203(a), the claimant satisfies his initial burden of production if he introduces into evidence one qualifying x-ray, one set of qualifying ventilatory or blood gas studies, or the documented opinion of one physician exercising reasoned medical judgment.[8] Contrary to the conclusion reached by Judge Widener and a majority of this Court that in the absence of a physician's opinion other medical evidence must be weighed before the (a)(4) presumption is triggered, I conclude that a physician's opinion is an absolute prerequisite to invoking the presumption under (a)(4) and that consequently weighing of the evidence is not appropriate.

Once the claimant's initial burden has been satisfied and the presumption is triggered, the burden necessarily shifts

[8]I am not persuaded by the contention advanced by the employers and the Director that the Administrative Procedure Act (APA), 5 U.S.C. §§ 554 *et seq.*, requires the presumption to be invoked under a preponderance of evidence standard. To the extent that the APA would normally be applicable on this question, I find that the statutory and regulatory scheme establishing the interim presumption supersedes the APA's evidentiary requirements.

Nor am I convinced by Judge Phillips' view, that the regulation's use of the word "establish" in both the trigerring and rebuttal portions compels a conclusion that to trigger the presumption the claimant bears the burden of persuasion under a preponderance standard. "Establish," as used in Part (a) simply means that the claimant must prove at least one of the factual prerequisites to invoke the presumption, i.e., one qualifying x-ray, one set of qualifying ventilatory or blood gas studies, or the documented opinion of one physician. As used in Part (b), "establish" means that the employer must prove the facts necessary to rebut the presumption and ultimately to persuade the factfinder that the claimant is not entitled to benefits.

to the employer to rebut it. Under Part (b) of the regulation, rebuttal of the interim presumption is subdivided into four categories. The presumption is rebutted if the employer establishes that (1) the miner continues in his usual coal mine work or in gainful employment requiring similar skills and abilities; (2) the miner is able to do his usual coal mine work or gainful work requiring similar skills and abilities; (3) the miner's death or disability did not arise, in whole or in part, out of coal mine employment; or (4) the miner does not have pneumoconiosis. 20 C.F.R. § 727.203(b).

It is in the rebuttal portion of the regulation, after the burden has shifted to the employer, that the Secretary incorporated Congress' "all relevant evidence" language, requiring that "[i]n adjudicating a claim under this subpart, all relevant medical evidence shall be considered." 20 C.F.R. § 727.203(b). In my view, placement of this language is not, as the employers argue, awkward or inexact, but entirely appropriate and consistent with congressional intent. For it is after hearing the rebuttal phase of a case where the presumption has been invoked, and determining whether the employer has sustained its burden of proving by a preponderance of the evidence that the claimant does not have pneumoconiosis, or does not otherwise meet the criteria for eligibility found at § 727.203(b)(1)-(b)(4), that the factfinder is in a position to make a final decision on the claim based on the weighing of "all relevant evidence."

As we concluded in addressing the employer's rebuttal obligation under § 727.203(b)(3), in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123-124 (4th Cir. 1984):

> [T]he employer must *rule out* the causal relationship between the miner's total disability and his coal mine employment in order to rebut the interim presumption . . . The reality of coal mine

> employment is such that many physical and environmental factors may converge to produce a totally disabling respiratory or pulmonary impairment. The Secretary's rebuttal regulation acknowledges this reality and, consistent with the letter and spirit of the Black Lung Act and traditional workers' compensation principles, *places the burden on the employer to disprove the causal relationship between coal mine employment and total disability once the claimant establishes the existence of a qualifying medical condition.* (emphasis added).

Massey correctly recognized the effect of shifting the burden of persuasion onto the employer once the presumption under § 727.203(a) had been invoked. In *Alabama By-Products v. Killingsworth,* 733 F.2d 1511, 1514 (11th Cir. 1984), the Eleventh Circuit similarly concluded that:

> The plain meaning of the regulatory language of 20 C.F.R. § 727.203(b) demonstrates that the burden of persuasion shifts to the employer on rebuttal. Under section 727.203(b), the employer is required to "establish" the elements of rebuttal. "Establish" is clearly synonymous with "prove." Furthermore, under section 727.203(b), the factfinder must consider "all relevant medical evidence" to determine if the presumption has been rebutted, thus indicating that the factfinder must consider evidence introduced by both sides and that the operator must persuade the factfinder.

(footnote omitted). The Sixth and the Tenth Circuits have likewise concluded that the burden of persuasion under § 727.203(b) shifts to the employer on rebuttal. *Gibas v. Saginaw Mining Company,* 748 F.2d 1112, 1120 (6th Cir. 1984), *cert. denied,* ____ U.S. ____, 53 U.S.L.W. 3824 (U.S. May 20, 1985) (No. 84-1344); *Kaiser Steel Corporation v. Director, Office of Workers' Compensation Programs,* 748 F.2d 1426, 1430 (10th Cir. 1984).

This statement of the employer's rebuttal obligation is, moreover, consistent with the interpretation of the employer's burden under the fifteen-year statutory presumption. *Cf. United States Steel Corp. v. Gray,* 588 F.2d 1022, 1028 (5th Cir. 1979). ("The statute shifts to the Secretary or to the mine operator the burden of disproving disability due to pneumoconiosis once the claimant makes the threshold showing that he worked fifteen or more years in the mines and suffers a totally disabling respiratory or pulmonary impairment. The burden on the Secretary or operator is then to prove by a preponderance of evidence that the claimant does not suffer pneumoconiosis, as defined by the Act, or that the impairment is not connected with his employment in the mines.")[9]

Neither the statute nor the regulation addresses the quantum of evidence that constitutes a preponderance of all relevant evidence. To me, however, it is significant that Congress qualified the "all relevant evidence" standard by specifically providing that "no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram." 30 U.S.C. § 923(b). *Id.* Thus, I would find that neither a single negative x-ray nor multiple negative x-rays may constitute the sole basis for denying

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[9]The fifteen-year rebuttable presumption at issue in United States Steel Corp. v. Gray, 588 F.2d 1022, 1028 (5th Cir. 1979), is found at 30 U.S.C. § 921(c)(4).

benefits.[10] Furthermore, I would continue to adhere to our holding in *Whicker v. U.S. Dept. of Labor Benefits Review Board*, 733 F.2d 346, 349 (4th Cir. 1984), that "*[n]on-qualifying* test results . . . cannot be used as the *principal* or *exclusive* means of rebutting an interim presumption of pneumoconiosis" under 20 C.F.R. § 727.203(b) (emphasis added). To hold otherwise would, as we noted in *Whicker*, defeat "the specific language and purposes of the applicable regulations." *Id.* Nevertheless, I agree that non-qualifying test results may be part of the rebuttal inquiry under the "all relevant evidence" standard, and are particularly relevant when they are given a detailed interpretation by an examining physician in reaching a medical conclusion as to a claimant's impairment.

In summary, I conclude that in a black lung case involving use of the interim presumption in Part C claims, the claimant has the initial burden of producing evidence which meets one of the medical requirements listed in § 727.203(a)(1) through (a)(4), i.e. one positive x-ray, one qualifying set of ventilatory or blood gas studies, or one physician's opinion. Of course, the evidence submitted by

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[10]The legislative history to the 1972 amendments documents Congress' special concern over the inadequacy of x-ray technology in diagnosing pneumoconiosis. S. Rep. No. 92-743, p. 12 (1972), U.S. Code Cong. & Admin. News 1972, p. 2305; Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31-34 (1976), United States Steel Corp. v. Gray, 588 F.2d 1022, 1027-28 (5th Cir. 1979).

The employers' and Director's contention that the presumption must be *invoked* by a preponderance of like-kind evidence would, with respect to x-rays, in some cases prevent the presumption from ever being triggered and thus subvert the congressional intention not to deny claims on the basis of a negative chest x-ray. This result, which Judge Phillips' opinion condones, places the regulation in conflict with the authorizing statute and is in and of itself a sufficient ground for finding the Director's interpretation invalid.

the claimant to trigger the presumption must conform to pertinent standards for quality and authenticity. Once the initial burden is satisfied, I would find that the burden of persuasion shifts to the employer, who then must prove by a preponderance of evidence that the claimant does not have pneumoconiosis, or that he continues to perform or is capable of performing his usual coal mine work, or that the impairment is not connected with his employment in the mines.

In deciding whether the presumption has been rebutted, and ultimately whether the claimant is entitled to black lung benefits, I agree that the factfinder must consider all relevant evidence, but with the proviso that (1) a claim may not be denied solely on the basis of any negative x-ray and (2) non-qualifying test results may not be the primary or exclusive means of rebutting the presumption.

In applying these views to the facts of the three cases before us, I conclude as follows:

1. **Stapleton**

I would find that in Stapleton's case the ALJ correctly concluded that the 1976 positive x-ray was sufficient to invoke the interim presumption under (a)(1). Moreover, I would find that the presumption was also triggered under (a)(2) by the positive ventilatory study. Nevertheless, I would affirm the Board's denial of benefits on the ground that there is substantial evidence to demonstrate that the presumption was sufficiently rebutted. This evidence included the reports of Stapleton's treating physician and other examining physicians that claimant suffered from a cardiac disability rather than from a pulmonary impairment.

2. Ray

In Ray's case, I cannot accept appellant's contention that the presumption was triggered under (a)(1) by the 1974 positive x-ray. This x-ray was not sufficiently identifiable to meet the regulatory requirements for an x-ray under 20 C.F.R. § 718.102(c), which provides, *inter alia*, that "[t]he report shall specify the name and qualifications of the person who took the film and the name and qualifications of the physician interpreting the film." I would find, however, that because of the two qualifying ventilatory studies and the opinion of at least one physician that Ray was totally disabled due to a respiratory impairment, the presumption was triggered under (a)(2) and (a)(4). Because the ALJ incorrectly concluded that the presumption was not invoked, I would remand this case for a determination of whether the presumption was rebutted.[11]

3. Mullins

I would find that there was sufficient evidence to invoke the presumption on behalf of the claimant, Cornett, under (a)(1), (a)(2), (a)(3), and (a)(4). Furthermore, I would affirm the Board's decision granting benefits on the ground that it is supported by substantial evidence and that the employer did not meet its rebuttal obligation.

As stated in the per curiam opinion summarizing the results in these cases, the award of benefits to Cornett is affirmed. However, in accordance with Part III. B. of this opinion, *infra*, in which all the judges have joined, that

[11]In reviewing the record, I note that the ALJ overlooked the reading of an x-ray dated January 3, 1977, as positive. I would require this x-ray to be evaluated on remand along with the other evidence.

portion of the decision below which awarded interest on Cornett's claim back to July, 1978, is reversed and the case is remanded with directions that an appropriate award of interest be entered to commence thirty days after the date of the initial determination of eligibility.

B. Pre-judgment Interest

The interest regulation at issue in *Mullins*, 20 C.F.R. § 725.608(a)(1979), provides that:

> If an operator or other employer fails or refuses to pay any or all benefits due under the terms of an initial determination by a deputy commissioner (§ 725.420), a decision and order filed and served by an administrative law judge (§ 725.478) or a decision filed by the Board or a United States court of appeals, including any penalty awarded in addition to benefits in accordance with § 725.607, such operator shall be liable for 6 percent simple annual interest on all past due benefits computed from the date on which such benefits were *due and payable* . . . .

(Emphasis added).

The Director interprets the regulation to provide for the assessment of interest only from the date thirty days after the first favorable decision, whether made by the Deputy Commissioner in an initial determination, or by an ALJ, the Board, or a court of appeals. The Board has rejected the Director's interpretation and, as in this case, has construed 20 C.F.R. § 725.608(a) to provide for the assessment of interest from the date of a claimant's eligibility under the Act, i.e., from the due date of any retroactive payment to which a claimant ultimately becomes entitled under a decision awarding benefits.

On appeal, Mullins and the Director contend that the Director's interpretation must be accorded deference and that the Board's substitution of its own interpretation of the interest regulation constitutes improper rulemaking and is erroneous as a matter of law. We agree.

The "common law rule is that the one who owes a sum of money at a date certain is obliged to pay interest for withholding payment." *Howmet Aluminum Corp. v. Hartford Accident & Indemnity Co.*, 665 F.2d 476, 479 (3d Cir. 1981). Thus, as a general rule, interest may be awarded only for the wrongful withholding of payment on a liquidated claim, after the payment obligation arises. *Milgo Electronic Corp. v. United Business Communications, Inc.*, 623 F.2d 645, 667 (10th Cir.), *cert. denied*, 449 U.S. 1066 (1980); *New York Shipping Ass'n v. Federal Maritime Commission*, 571 F.2d 1231, 1242 (D.C. Cir. 1978).[12]

Moreover, although there was no statutory provision regarding interest on benefit awards until 1981, the 1981 amendments adopted the Director's interpretation. 30 U.S.C. § 932(d) now provides that:

> With respect to payments withheld pending final adjudication of liability in the case of claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981 [January 1, 1982], such interest shall commence to accumulate 30 days after the date of the determination that such an award should be made.

[12]The reasonableness of this rule, as applied by the Director in his interpretation of 20 C.F.R. § 725.608(a), is illustrated by the circumstances of this case. Cornett's eligibility date is July 1, 1978. Cornett, however, had terminated his employment with Mullins on April 30, 1976. He waited for more than two years after ceasing work to file a claim for benefits in July, 1978. Another fifteen months passed before Mullins first had knowledge of Cornett's claim on October 9, 1979. It was not until five months thereafter, on March 22, 1980, that Mullins first incurred liability on the claim, thirty days after the Deputy Commissioner issued his intitial determination on February 20, 1980. 20 C.F.R. 725.522(a) and .530(a).

We have held that "later acts of Congress should be accorded 'significant weight' in determining the intent of earlier legislation." *Director, OWCP v. National Mines Corp.*, 554 F.2d 1267, 1275 (4th Cir. 1977), *quoting NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). The Board, however, rejected the Director's interpretation as the interpretation intended by Congress, relying (1) upon the position taken by the Director on the interest question in an earlier case, *Honaker v. Jewell Ridge Coal Corp.*, 2 BLR 1-947 (Benefits Review Board, 1980), aff'd on other grounds mem. sub. nom. *Jewell Ridge Coal Corp. v. Honaker*, No. 80-1593 (4th Cir. March 26, 1981); (2) upon the decision of this Court in *Clinchfield Coal Co. v. Cox*, 611 F.2d 47 (4th Cir. 1979); and (3) upon case law developed under the Longshoremen's and Harbor Workers' Compenpensation Act, 33 U.S.C. § 901 *et seq.*, many of the provi-provisions of which are incorporated into the Black Lung Benefits Act. We agree with Mullins and the Director that the Board's reliance was misplaced.

The claims in *Cox* and *Honaker* were processed and approved in accordance with the Black Lung Benefits Act of 1972, under which no interest regulation had been promulgated. Section 725.608(a), first promulgated in 1978 to implement the 1978 Amendments, was inapplicable to those claims. Neither the regulation nor the Director's interpretation of that regulation was at issue in either case. We hold, therefore, that the Board erred in relying on *Cox* and the Director's position in *Honaker* to reject the Director's interpretation of 20 C.F.R. § 725.608(a) in the instant case. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

The Board also erred in relying on the Longshoremen's Act. Interest under the Longshoremen's Act, like interest under the Director's interpretation of 20 C.F.R. §

725.608(a), accrues only from the date that an employer first incurs a payment obligation for a liability on a disability claim. *Cf.* 33 U.S.C. § 914(b), 918 and *Strachan Shipping Co. v. Wedemeyer,* 452 F.2d 1225 (5th Cir. 1971), *cert. denied,* 406 U.S. 958 (1972) *with* 20 C.F.R. § 725.522(a). Given that fact, the Director's interpretation of 20 C.F.R. § 725.608(a) comports with the manner in which interest is awarded under the Longshoremen's Act.

Even assuming otherwise, however, we conclude that the Board erred in relying on the Longshoremen's Act to interpret 20 C.F.R. § 725.608(a). As this Court stated in *National Mines Corp., supra,* "[t]he Black Lung Act does not inflexibly incorporate every provision of the Longshoremen's Act." 554 F.2d at 1273. Instead, "Title 30 U.S.C. § 932(a) specifically states that the provisions of the Longshoremen's Act shall be applicable 'except as the Secretary shall by regulation otherwise provide.' " *Id.* This indicates a "congressional intention to empower the Secretary to depart from specific requirements of the Longshoremen's Act in order to administer the black lung compensation program properly." *Id.* at 1274. Thus, the Board's review of the Director's interpretation of 20 C.F.R. § 725.608(a) was governed not by the Longshoremen's Act, but, instead, by the Black Lung Benefits Act.

For the foregoing reasons, we uphold the Director's interpretation of the interest regulation as reasonable and find that interest shall accrue only from the date beginning thirty days after the first agency decision awarding black lung benefits. We accordingly reverse that portion of the decision in *Mullins* which awarded interest as of July 1, 1978.[13]

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[13]We note that the Seventh Circuit has recently reached the same conclusion on this issue in Peabody Coal Company v. Blankenship, ___ F.2d ___, No. 83-2399 (7th Cir. September 19, 1985).

I am authorized to say that Judge Winter, Judge Sprouse, and Judge Sneeden join in this opinion.

PHILLIPS, Circuit Judge, concurring in part
and dissenting in part:

I concur in the result in No. 83-2193 (*Stapleton/Westmoreland* affirmed), in the result in No. 84-1528 (*Cornett/Mullins* affirmed in part and reversed in part), and in Part III B of Judge Hall's opinion dealing with prejudgment interest.

I dissent from the result in No. 84-1520 (*Ray/Jewell Ridge* reversed) and I disagree with major elements of the opinions of Judge Hall, Judge Widener, and Judge Sprouse respecting the meaning and application of 20 C.F.R. § 727.203, the "interim presumption" regulation.

I

I note at the outset that my perception of our proper function in interpreting this "interim presumption" regulation may differ in a critical respect from that of my brethren who come to different interpretations than mine. As I read their opinions, they reflect (though in different degrees) a general perception that we are free to interpret this regulation in the same way that we would interpret any statute or procedural rule having the force of statute, drawing on logic and legal reasoning and aided by the ordinary canons of statutory construction (including the "plain meaning" canon) to divine the promulgator's intent as reflected in the regulation's text.

The problem with that approach here is two-fold. First, we are not interpreting a statute or procedural rule having statutory force, but an agency's regulation promulgated by authority and direction of Congress. Second, we have before us the agency's own interpretation of the regulations'

intended meaning and operation in the context of the cases we are reviewing.[1]

In this situation, our interpretive role in judicial review is narrowly circumscribed. It is not direct, free "construction" of the legal meaning of the regulations' text, but something quite different. We should address, in sequence, only two questions.

First: whether the agency's interpretation is "plainly erroneous or inconsistent wit the regulation"? *United States v. Larionoff*, 431 U.S. 864, 872 (1977). If it is not so, that interpretation is the "ultimate criterion" for determining legal meaning, and has "controlling weight" for that purpose. *Id.* (citing and quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945)).

Second: If the agency's interpretation passes that deferential test and thereby supplies the regulation's legal meaning, whether the regulation as so construed is "consistent with the statute under which [it was] promulgated"? *Larionoff* 431 U.S. at 873. The regulation's ultimate

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[1]The relevant agency interpretation is that formally represented to us on these appeals by the Director, Office of Workers' Compensation Programs who, as administrator of the Black Lung program by delegation of the Secretary of Labor, is authorized to make the agency interpretation. *See* 20 C.F.R. §§ 701.201, .202 (1979). The Director is before the court as a formal party by permitted intervention in these appeals, for the stated purpose of defending that interpretation.

Judge Sprouse fairly makes the point that agency interpretations advanced, as here, as litigation positions may be the least weighty type so far as judicial deference is concerned. Nevertheless, the one before us is given us as the official interpretation by the agency head. It is the only one we have. We effectively invited it from an interested agency not an original party to the actions. We have no indication that this interpretation, though advanced in specific litigation, is not the agency's general position, nor that it is not "consistently applied" by the agency in its base-line administration of the regulation.

validity – whether it has the force of law – may turn on this. *Id.*

In effect, this requires that we take the agency's interpretation as the starting point for our judicial review of the disputed issue of the regulation's legal meaning. Agency interpretation controls and has the force of law unless it is in the first instance "plainly erroneous or inconsistent with the regulation" itself or, beyond that, would yield a meaning for the regulation that is inconsistent with the authorizing statute. Only if the agency's interpretation were impermissible as interpretation or produced an invalid regulation should we decline to apply the regulation as so interpreted (and possibly substitute our own "saving"interpretation). *See generally* K. Davis, *Administrative Law*, § 7.22 (2d ed. 1980).

Applying these principles of judicial review, I would hold the agency's interpretation here not plainly erroneous or inconsistent with the regulation, and the regulation as so interpreted not inconsistent with the authorizing statutes. On that basis, I would interpret and apply the regulation in accordance with the agency's interpretation rather than any conflicting one that we might come up with as a matter of original and independent construction, including that partially conflicting interpretation reached here by the en banc court.[2]

[2]A critical reason for the principle of deference to an agency's interpretation of its own regulations – aside from the obvious fact of authorship – is to encourage national uniformity of application. Given the range of arguably reasonable interpretations that are possible with respect to the details of a regulation such as that here in issue, the principle is particularly compelling here. Faithful adherence to the principle simply does not permit courts to substitute their own possibly "better" views of what a regulation *should* have provided in order *best* to carry out congressional intent as divined by the courts. Among other unhappy consequences of that approach is the inevitable divergence of views and applications that will emerge in judicial interpretations from circuit to circuit. Only if courts confine their review of agency interpretations to holding them within the outer bounds of the range of reasonableness contemplated by the principle of deference can the principle's aims be achieved. This necessarily requires courts sometimes to yield their possibly "better" judgments about what an agency should have written, or about how an agency should have interpreted what it, after all, has written.

II

The first question is whether the agency's interpretation is "plainly erroneous or inconsistent with the regulation." In addressing that, our only tools are "the plain words of the regulation and any relevant interpretations of the [agency]." *Bowles*, 325 U.S. at 414.

The agency interpretation, as presented in the Director's brief, can be summarized and paraphrased in its most salient aspects as follows.

1. Under the proof scheme of 20 C.F.R. § 727.203, which creates a rebuttable presumption of compensable black lung disability, both claimant and operator bear opposing burdens of persuasion, the former to invoke the presumption, the latter to rebut the presumption if it is invoked.[3]

2. Under § 727.203(a)(1)-(4), the claimant bears the initial burden of proving specified factual predicates: (a) that he is[4] a miner who engaged in coal mine employment

[3]Where, as here, a presumption is to be applied by an administrative fact-finder (or a bench trial judge) rather than by a judge controlling a jury trial, its essential function is not to prescribe a rigid order of proof, but simply to dictate an orderly process of evidence assessment. A ready analogy is the process of applying the judicially created *McDonnel lDouglas* presumption of discrimination in Title VII bench trials, as explained in *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978) ("merely a sensible, orderly way to evaluate the evidence"); *see also* McCormick on Evidence, § 344 n.2 (3d ed. 1984).

[4]For simplicity's sake, this discussion is confined to living miner's claims – those being the only ones technically before us on these appeals.

for at least 10 years, and either that (b), as established by x-ray, biopsy, or autopsy, he has pneumoconiosis, § 727.203(a)(1), or that (c) as established by ventilatory studies, he has a chronic respiratory or pulmonary disease as measured by specified clinical requirements and values, § 727.203(a)(2), or that (d), as demonstrated by blood gas studies, he has a specified clinical level of impairment of his system's ability to transfer oxygen from lungs to blood, § 727.203(a)(3), or that (e), as established by "[o]ther medical evidence, including the documented opinion of a physician exercising reasoned medical judgment," he has a totally disabling respiratory or pulmonary impairment, § 727.203(a)(4).

3. If the claimant invokes the presumption by proving (a) and anyone (or more) of (b)-(d), he has established a prima facie case of compensable disability. The burden of persuasion thereupon shifts to the operator to rebut the presumption, failing which the claimant is entitled to benefits.

4. Under § 727.203(b)(1)-(4), the operator's burden of proof in rebuttal may only be carried by proof of facts that negate elements of the disability claim *vel non* that were not established to invoke the presumption. Thus, the presumption may be rebutted (a) by proof that the claimant is in fact doing or is able to do his usual coal mine work or comparable and gainful employment, *unless* the presumption was invoked by proof under § 727.203(a)(4) that claimant had a totally disabling respiratory or pulmonary impairment, § 727.203(b)(1), (2); or it may be rebutted (b) by proof that the disability established did not in fact arise in whole or in part out of coal mine employment, *whatever* the basis for invocation of the presumption, § 727.203(b)(3); or it may be rebutted (c) by proof that the claimant does not have pneumoconiosis, *unless* the presumption was invoked by proof under § 727.203(a)(1) that claimant does have pneumoconiosis, § 727.203(b)(4).[5]

[5] Judge Hall's analysis, slip op. pp. 23, 24 & n.7, of this aspect of the Director's interpretation simply, with all deference, mistakes its import. In no way does the Director's interpretation make the "presumption," as opposed to the "basic facts" of the presumption, "irrebuttable" in whole or in part, and thus in conflict with the statutory requirement that any presumption of this sort be rebuttable.

Judge Hall's analysis seemingly fails to grasp that, as interpreted by the Director and as its text plainly contemplates, the presumption may be invoked under (a)(1)-(4) by the establishment (along with miner status and 10 years mine employment) of any one or more of four different "medical requirements." As established, these then constitute the "basic facts" of the presumption, whose "presumed facts" then vary depending upon which of the "medical requirement" basic facts have been established. For example, if pneumoconiosis' existence is *established* as a "basic fact" under (a)(1), its mine-relatedness and its totally disabling effect become the "presumed facts" of the presumption, and this combination of basic and presumed facts make out a prima facie claim of compensable black lung disability. Under any possible combination of basic and presumed facts arising under (a)(1)-(4) there will be some "presumed facts" subject to rebuttal under (b)(1)-(4). But only the "presumed facts" are rebuttable, *not* the "basic facts." Thus, continuing the example, if pneumoconiosis' existence has been "established" as a basic fact under (a)(1), that fact may not be "rebutted" (as the "basic facts," once "proven," of presumptions in general may not be), but the "presumed facts" of mine-relatedness and of total resulting disability may of course be rebutted under, respectively, (b)(3) (not mine-related) or (b)(1) or (b)(2) (not totally disabling).

The analysis in text of this opinion, using the word "unless," which to Judge Hall suggests an irrebuttable operation, simply describes the interrelation between the particular basic facts as established under (a)(1)-(4) and the resulting presumed facts that remain rebuttable under one or more of (b)(1-(4). That is, the existence of pneumoconiosis may be rebutted under (b)(4) *unless* that "fact" has been established as a basic fact under (a)(1); but in the latter case, the "presumption" yet remains rebuttable, by disproof of the "presumed facts" of mine-relatedness or of total resulting disability.

Ironically, it is Judge Hall's interpretation that would make the presumption effectively irrebuttable in some situations. *See* slip op. pp. 55-56, *infra*.

5. The burdens of persuasion borne by both claimant and operator respectively are burdens to prove the relevant facts by a preponderance of the evidence.

6. In applying this presumption-based proof scheme, claim adjudicators are required to consider "all relevant medical evidence," both in assessing whether the presumption has been invoked and whether it has then been rebutted.

I do not see how this interpretation, either in its general sweep or in its specific parts, could be declared "plainly erroneous or inconsistent with the regulation," looking, as we are required to do, only to the "plain words of the regulation" and the agency's interpretation of its own handiwork.

It is notorious in legal scholarship that the nature and intended operation of evidentiary presumptions rank among the greatest conceptual puzzles in the law. Attempts to categorize presumptions in systematic ways have long occupied and divided our best procedural scholars. *See generally* McCormick on Evidence §§ 342-344 (3d ed. 1984). Only the most artful and knowledgeable legislative drafting (or judicial opinion) is likely to produce an evidentiary presumption whose intended operation – whether as rebuttable or irrebuttable," "bubble-bursting" or more drastic, etc. – is manifest from its plain text. Given the conceptual and practical difficulties involved, it is therefore no reproach to the drafters of the "interim presumption" of 20 C.F.R. § 727.203 to start with the proposition that this presumptions' intended operation is by no means manifest from its "plain words." That very fact, however, makes it difficult to find any particular interpretation of its intended operation "plainly erroneous or inconsistent" in relation to its text. So it is with the Director's interpretation.

Looking first to the overall sweep of that interpertation,

it might possibly be thought "plainly erroneous" if it comported with no known pattern of presumptions. But that cannot be said. While its most distinctive feature – casting persuasion burdens both to invoke and then to rebut the presumption – is not the only or even the most common presumption pattern, it is certainly one not unknown in traditional usage. *See generally id.* at § 344, pp. 974-76.

Neither is there any internal inconsistency within the Director's interpretation of the presumption's basic operation that might be thought to make it "plainly erroneous." Indeed, the Director's interpretation makes sense as a matter of practical operation. As so interpreted, the regulation meshes the opposing burdens of proof in a coherent proof scheme that addreses and permits resolution, without conflicting findings, of all elements of the basic statutory claim of black lung disability: (a) that claimant is a miner (b) who has pneumoconiosis (c) due to mine employment (d) that totally disables him. 30 U.S.C. §§ 901(a), 902.

Turning next to the most critical specifics of the Director's interpretation, the plain words of the presumption do not negate the Director's interpretation that the proof burdens borne by both sides are persuasion burdens under a preponderance of evidence standard. The most directly operative word suggesting the nature of the burdens borne, both as to invocation and rebuttal, is "establish."[6]

[6]This is the operative word in each of the invocation and rebuttal subsections of § 727.203 except subsection § 727.203(a)(3) which inexplicably shifts to the word "demonstrate" in referring to proof by blood gas studies.

The Director's related interpretation that the persuasion burden is one of proof by a preponderance of the evidence is at the least not plainly erroneous or inconsistent with the regulation's text. In fact, it is unassailable. Quite typically, the regulation expresses no standard. In such a circumstance, the preponderance standard, as the usual one in civil litigation, is presumptively the proper one. Beyond that, as the Director points out, this is the standard dictated by the Administrative

In common usae this imports proof of a fact, *see Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1514 (11th Cir. 1984), rather than the mere production of evidence of a fact's existence. *Cf., e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (in interpreting the judicially constructed presumption of disparate treatment in Title VII litigation, "articulating" a non-discriminatory reason connotes a mere burden of production). While a persuasion burden interpretation may not be compelled by the word "establish," that interpretation is surely consistent with the term. Indeed, it would appear to be the interpretation most consistent with the regulation's "plain words." Certainly it would be a questionable interpretation that found different burdens connoted by the same word "establish" as used on opposite sides of the presumption.[7]

The Director's related interpretation that "all relevant medical evidence shall be considered" both in assessing invocation and rebuttal of the presumption, finds flat support in the plain words of the regulation.[8] While the clause so stating appears in the rebuttal subsection, § 727.203(b), of the regulation, it is found there in an introductory passage which refers to the total process of "adjudicating a claim under this subpart," i.e., Subpart C, which deals at large with the "Criteria for Determining Eligibility for Benefits." Certainly this aspect of the Director's interpretation cannot be declared plainly erroneous or inconsistent in relation to the regulation's text.

Procedure Act in the absence of any specific standard's expression. 5 U.S.C. §§ 554, 559.

Judge Hall's basic disagreement on this point, which the court majority must accept apparently goes to whether a persuasion burden under any standard is borne by the claimant rather than to the nature of the standard. But Judge Hall concludes that the APA standard is inapplicable because "superseded" by the relevant Black Lung statutes and regulations. Slip op. pp. 24-25 & n.8. No support is advanced for this cryptic "conclusion" of something akin to implied repeal of the APA provisions.

[7]But that is necessarily the interpretation of Judge Hall and a majority of the en banc court, when Judge Hall writes, at odds with the Director's internally consistent interpretation, that the claimant's burden to invoke the presumption is not one of persuasion by a preponderance of the evidence, but is merely one of "producing evidence which meets one of the medical requirements [of § 727.203(a)(1)-(4)]." Slip op. p. 29.

III

There remains only the question whether the regulation as interpreted by the Director consistently with its text is nevertheless inconsistent with the statutes under which it was promulgated. Aagain, I do not see how it could be so found; indeed, it is perfectly consistent with both the letter and spirit of the relevant statutes.

The relevant statutory authorization begins by giving to the Secretary of Labor the responsibility and commensurate power to define by regulation the meaning of compensable black lung "total disability." 30 U.S.C. §§ 902(f)(1), 921(b). This general power to define is obviously not unlimited; it is constrained in certain respects relevant to the Director's interpretation of 20 C.F.R. § 727.203, but the Director's interpretation lies well within all the statutory constraints. I take these in order.

1. By statute, any regulations promulgated must provide that a living miner is "considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those [of his or her former mine employment]." The regulation as interpreted by the Director is

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[8]Indeed, it derives ultimately from a statutory provision to the same express effect in 30 U.S.C. § 923(b).

consistent with this statutory constraint, by expressing it as a basis for rebutting the presumption by disproving the presumed fact of total disability. 20 C.F.R. § 727. 203(b)(2); *see also* 20 C.F.R. § 410.412(a)(1).

2. By statute, the regulation may not "provide more restrictive criteria than those applicable under Section 423(d) of Title 42," the criteria for establishing "disability" for disability insurance purposes under the Social Security Act. Under the Director's interpretation, a black lung claimant's proof burden to establish disability is significantly lighter than is that of a social security disability insurance claimant. The black lung claimant need only establish, by any of various clinical tests, that he suffers one of specific medical conditions in order to place the burden of disproving his total disability from mine-employment related pneumoconiosis upon his employer. 20 C.F.R. § 727.203(a)(1)-(4). By contrast, the social security disability claimant must establish a disabling impairment that at least prevents his return to former work to place on the government the burden of disproving his compensable disability. *See Hall v. Harris,* 658 F.2d 260, 264 (4th Cir. 1981). The black lung criteria provided by § 727.203 are therefore significantly less restrictive than are those imposed on social security disability claimants.

3. By statute, the regulations may not impose criteria more restrictive than those applicable to Part "B" claims. 30 U.S.C. § 902(f)(2). The criteria are now identical, hence there is no inconsistency with this statutory constraint.

4. Built into the statutory criteria for determining black lung disability is a 10-year "rebuttable presumption" that pneumoconiosis suffered by a miner wiht ten or more years of mine employment is employment related. 30 U.S.C. § 921(c)(1). The interim presumption of 20 C.F.R. § 727.203 is clearly consistent with, indeed directly implements, this special proof dispensation conferred on claimants by statute.

5. By statute, any regulations promulgated are made expressly subject to the provisions of 30 U.S.C. § 923(b). 30 U.S.C. § 902(f)(1). Among the provisions of § 923(b) is the provision that "no claim for benefits . . . shall be denied solely on the basis of the results of a chest roentgenogram." As interpreted by the Director, the interim presumption is not inconsistent with this limitation on the denial of claims. Nothing in the Director's interpretation prevents a claim adjudicator, in assessing "all relevant evidence," including X-rays, from honoring his provision. The statutory provision simply makes impermissible any adjudication either that the presumption has not been invoked or that it has been rebutted "solely on the basis of the results of *a* chest [X-ray]" (emphasis supplied).[9] Conformably with the Director's interpretation, a single negative X-ray may not therefore be drawn upon either as the sole basis for finding the invocation burden under (a)(1) not carried nor as the sole basis for finding the rebuttal burden under (b)(4) carried.

[9]Judge Hall draws upon this statutory provision as support for an interpretation that negative X-ray readings may not be considered *at all* in assessing whether the presumption has been invoked under § 727.203(a)(1). To hold otherwise, he says, would "in some cases . . . subvert the congressional intention" expressed in this provision. Slip op. p. 28-29, no. 10.

With respect, this claims too wide an effect for the limitation. Unless it means something other than "*a* negative chest X-ray," it does not compel a reading that negative X-rays in general may not be considered at this stage, but only that a single one may not defeat the claim either at this or any stage.

Under Judge Hall's apparent interpretation, negative X-rays simply have no place in assessing claims under the interim presumption when the triggering provision of § 727.213(a)(1) ("*a* chest [X-ray]") is considered in conjunction with the limitation on proof expressed in 30 U.S.C. § 923(b). This simply flies in the face of the obvious understanding, expressed in many ways in statutes and regulations and exemplified in practice, that negative X-ray readings may be introduced in evidence and considered in assessing claims under the interim presumption, subject only to the express limitation in 923(b).

Accordingly, neither in its general nor any of its specific aspects does the Director's interpretation give the regulation a meaning inconsistent with the authorizing statutes. That interpretation should therefore be accepted and applied by the court in conformity with the principles of construction expressed in *Bowles* and *Larionoff*.

IV

Judge Hall's interpretation conflicts with that of the Director in two critical respects.[10] First, it would hold that the claimant's burden of proof to invoke the interim presumption is only a burden to produce evidence meeting one of the "medical requirements" of § 727.203(a)(1)-(4), *i.e.*, one positive X-ray, or one set of qualifying ventilatory or blood gas studies, or one physician's opinion and that if such evidence meets "pertinent standards for quality and authenticity," conflicting "like kind" evidence cannot be weighed against it. Slip op. pp. 28, 29.[11] Second, it would hold that " '*non-qualifying* test results. . . cannot be used as the *principal* or *exclusive* means of rebutting an interim presumption of pneumoconiosis under 20 C.F.R. § 727.203(b)," although such test results "may be part of the rebuttal inquiry . . . and are particularly relevant when they are given a detailed interpretation by an examining physician in reaching a medical conclusion as to a claimant's impairment." *Id.* (emphasis in original).

[10]The disagreement on critical elements is not total. On the critical aspect of the nature of the employer's burden of proof in rebuttal, the Director's interpretation is also that the burden is one of persuasion. This, of course, is the single most important aspect of the presumption so far as the tipping the substantive balance is concerned. It insures a tremendous practical litigation advantage to claimants, given the narrow proffer of proof required to place this risk of nonpersuasion on employers.

[11]Critical to this aspect of Judge Hall's interpretation, as now accepted by a majority of the en banc court, is its emphasis on the word "a" that appears in subsections (a)(1) and (a)(4) of the regulation. This is said necessarily to import that "one" X-ray (or biopsy or autopsy?) and "one" physician's opinion suffice to trigger the presumption (and to preclude consideration of any contrary "like-kind" evidence).

With all respect, the word "a" in these two contexts seems to me better explained as a careless imprecision than as a deliberate means of conveying the critical meaning ascribed to it by Jduge Hall's analysis. The regulation at large is no more a grammarian's dream than it is a proceduralist's. Inexplicable oddities of syntax abound: e.g., the one-

The first of these holdings would require us to overrule our panel decision in *Consolidation Coal Co. v. Sanati*, 713 F.2d 480 (4th Cir. 1983), while the second would require us to reaffirm the panel decision in *Whicker v. United States Department of Labor Benefits Review Board*, 733 F.2d 346, 349 (4th Cir. 1984).

Laying aside all concerns of deference to the agency's interpretation of its own regulation, and with all respect to

time shift to the word "demonstrate" in place of "establish' in § 727.203(a)(3); the ungrammatical abandonment of parallelism caused by intrusion of the word "which" in § 727.203(a)(3); the ambiguous placement of the "all relevant medical evidence" mandate in the regulation.

Interestingly, Judge Hall's analysis has to abandon this literalist approach in order to bring the plural language of (a)(2) and (a)(3) (ventilatory and blood gas "*studies*") into line with its single test interpretation. This is accomplished by reading the singular word "set" into those two provisions. Slip op. p. 29.

In the final analysis, this all serves merely to illustrate the futility of trying to interpret this regulation by a pick-and-choose literalist approach. The word "a" is present both in § 727.203(a)(1) and (a)(4), and in 30 U.S.C. § 923(b), and cannot be read out of either. Looking to total context, the most rational interpretation is that "a" single positive X-ray (or physician's opinion) *may*, but need not necessarily, trigger the presumption under § 727.203(a)(1) or (4), and that a single negative X-ray may never provide the sole basis either for finding the presumption not invoked or for finding it rebutted once invoked under 30 U.S.C. § 923(b). So I think, should we interpret it. *See* Part V, *infra*.

Judge Hall's conflicting view, I think that view is simply wrong as a matter of original interpretation of a text's legal meaning. On that basis, independently of any special deference to the Director's contrary interpretation, I would interpret the regulation as does the Director and in consequence would reaffirm the critical holding in *Sanati*[12] and overrule that in *Whicker* and its precursor, *Hampton v. United States Department of Labor Benefits Review Board,* 678 F.2d 506 (4th Cir. 1982).

Though, as indicated, there are a number of detailed respects in which I think Judge Hall's interpretation is logically flawed, the underlying flaws are in its violation of the statutory mandate that "[i]n determining the validity of claims . . . all relevant evidence shall be considered," 30 U.S.C. § 923(b), and in its failure to appreciate the interrelation of the invocation and rebuttal elements of the interim presumption of 20 C.F.R. § 727.203.

An unmistakable consequence of this interpretation would be to preclude the consideration in many cases of highly relevant medical evidence respecting the validity of

[12]*Sanati* actually dealt directly only with the triggering effect of medical opinion under § 727.203(a)(4), but its analysis related more broadly to the operation of all the "triggering" provisions, (a)(1)-(4). Critically, and correctly in my judgment, Judge Widener's conclusion for the panel majority was that the presumption can only be triggered under any of these subsections by a preponderance of the evidence, i.e., that conflicting "like-kind" evidence must be considered. *See Sanati,* 713 F.2d at 482.

With all respect, I think Judge Widener's retreat now from *Sanati* is not warranted, certainly not by the cryptic (indeed legally incomprehensible) comment by the Secretary that he thinks compels his retreat. *See* slip op. 104,107 n-1. If this comment proves anything it is that it was intended by the Secretary that *all* like-kind medical evidence should be considered both in determining whether the presumption is invoked and whether it is rebutted.

black lung disability claims. For example, under that interpretation, if a claimant merely "produces" one positive X-ray, *i.e.,* one that a reader has "read positive," and that meets "pertinent standards of quality and authenticity," this effectively precludes the fact-finder's consideration, at any stage, of conflicting X-ray evidence, no matter what its relative quality and quantity. From such possibly meager, but uncontrovertible, evidence of the existence of a mere trace of pneumoconiosis, profound consequences ensue. The central element of the claim – that pneumoconiosis exists – is conclusively established. Additionally, the other elements of the claim – that the condition is due to mine employment and is totally disabling – are established unless rebutted by evidence that carries the burden of persuasion to disprove the presumed facts. Furthermore, the employer may then be prevented from rebutting the presumed facts of causation and totally disabling effect by bringing to bear what may be the very best and most trustworthy clinical evidence of the actual nature and extent of any respiratory or pulmonary impairment suffered by the claimant – ventilatory and blood gas studies. For that evidence may not be relied upon as the "principal or exclusive" means of rebuttal.[13]

[13]Aside from the fundamental point that this limitation on proof flies in the face of the statutory and regulatory mandate for consideration of "all relevant evidence," its exact meaning as expressed in *Whicker* seems to me so unclear that it is bound to produce great confusion in the adjudication of claims. Presumably it would spawn major inquiry into the exact extent that ventilatory and blood gas studies may have influenced medical opinions. The standard of "principal or exclusive" would seem unmanageable on any principled basis. Certainly it would provide a wider latitude for judicial review of particular determinations than can be healthy for either the administering agency or for the courts or, more importantly, for primary agency administration of the program as intended by Congress.

With all respect, such a consequence seems to me to reveal the unacceptability of such an interpretation of this presumption's intended operation. Indeed, it might well draw the constitutionality of such an interpretation in question by making the presumption effectively irrebuttable under some circumstances. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 36-37 (1976) (constitutionality of statutory or regulatory presumptions may turn on admissibility of all medical evidence relevant to their rebuttal). For as I read this proposed interpretation, if a claimant invokes the presumption by putting in evidence one (or more) X-rays read positive for pneumoconiosis, and the employer then offers in evidence the testimony of any number of the most highly qualified medical experts that, based principally upon the results of properly administered ventilatory and blood gas studies, they are of the opinion that the claimant is not significantly disabled by *any* respiratory or pulmonary condition, that evidence simply may not be considered in rebuttal of the *presumed* fact of total disability by reason of pneumoconiosis.

With deference, it seems to me that the court got off the track in *Whicker* (actually in *Hampton v. United States Department of Labor Benefits Review Board*, 678 F.2d 506 (4th Cir. 1982), which *Whicker* followed with modest refinement) in failing to recognize that such rebuttal evidence is not aimed at disproving the "established" fact of the existence of pneumoconiosis, but at the *presumed* fact of resulting total disability. *See Whicker*, 733 F.2d at 348. When this point is appreciated, consideration of such rebuttal evidence does not, as the *Whicker* panel saw it, "force[ ] the claimant to come forward with proof of pneumoconiosis by two or more accepted testing techniques before he could derive any practical benefit from the interim presumption." *Id.* It merely gives the employer a

fair opportunity – which may be constitutionally required – to prove, if proof is available, that any pneumoconiosis had is not totally disabling within the statutory meaning. Other circuits have so held. *See Drummond Coal Co. v. Freeman*, 733 F.2d 1523, 1527 (11th Cir. 1984); *Peabody Coal Co. v. Lowis*, 708 F.2d 266, 275 (7th Cir. 1983). Of course, bare "non-qualifying" test results offered in evidence without supporting medical interpetation related directly to the degree of disability revealed might well not suffice to carry the rebuttal burden. *See Peabody*, 708 F.2d at 274. But it surely goes too far flatly to preclude all consideration of a qualified medical opinion of non-disability based, even "principally," upon such clinical test results. *Id.* at 275.

V

Following the above analysis, I would interpret 20 C.F.R. § 727.203 as follows, conformably with the Director's interpretation.

1. A living claimant may invoke the presumption that he is totally disabled by pneumoconiosis due to mine employment by proving by a preponderance of the evidence (a) that he is a miner, (b) that he worked for at least 10 years in coal mines, and (c) that (1) he has pneumoconiosis, as established by X-ray or biopsy results, or (2) he has a respiratory or pulmonary impairment, as established by ventilatory studies yielding specified clinical values, or (3) he has a blood-oxygen impairment, as established by blood gas studies yielding specified clinical results, or (4) he has a totally disabling respiratory or pulmonary impairment as established by other medical evidence including the documented opinion of a physician. 20 C.F.R. § 727.203(a)(1)-(4).

2. Whether the "medical requirements" of (1)-(4) have been established is determined by weighing, under a preponderance of evidence standard, the type evidence required and produced as to each. For this purpose, no more than one such item (i.e., one positive X-ray under (a)(1) may suffice, depending upon its quality and the quality and quantity of any opposing X-ray evidence. However, a single negative X-ray may not be relied upon to prevent proof of the existence of pneumoconiosis by a preponderance of the evidence under (a)(1). 30 U.S.C. § 923(b).

3. Invocation of the presumption under (a)(1) conclusively establishes that the claimant has pneumoconiosis; it raises a further rebuttable presumption that the pneumoconiosis arose out of mine employment, *see* 30 U.S.C. § 921(c)(1), and that it is totally disabling, *see* 30 U.S.C. § 902(f)(1).

4. Invocation of the presumption under (a)(2) or (a)(3) conclusively establishes only that the claimant has certain levels of respiratory or pulmonary impairment; it raises the further rebuttable presumption that the impairment results from pneumoconiosis, that the pneumoconiosis arose from mine employment, and that it is totally disabling.

5. Invocation of the presumption under (a)(4) conclusively establishes that the claimant is totally disabled by a respiratory or pulmonary impairment; it raises the further rebuttable presumption that the totally disabling impairment results from pneumoconiosis, and that it arose from mine employment.

6. Upon invocation of the presumption under either one, or more, of (a)(1)-(4), the burden of persuasion is placed upon the employer to disprove by a preponderance of evidence any essential element of the claim that is only rebuttably presumed by reason of the claimant's proof in-

voking the presumption. Thus, if the presumption was invoked under (a)(1) (X-ray or biopsy evidence) the employer may only rebut the presumption by proving by a preponderance of the evidence that the conclusively established pneumoconiosis did not arise out of mine employment or was not totally disabling within the statutory meaning.

If the presumption was invoked under (a)(2) or (a)(3), the employer may rebut it by proving by a preponderance of the evidence that the claimant's clinically established impairment does not result from pneumoconiosis, or that if it does, the pneumoconiosis did not arise from mine employment or is not totally disabling.

If the presumption was invoked under (a)(4), the employer may rebut it by proving by a preponderance of the evidence that conclusively established totally disabling respiratory or pulmonary impairment is not pneumoconiosis, or that if it is, it did not arise from mine employment.

In any event, a single negative X-ray may not be relied upon as the sole basis for finding the presumption rebutted by disproving the presumed existence of pneumoconiosis. 30 U.S.C. § 923(b).

7. If the employer fails to carry the burden of persuasion in rebuttal by the available means, the claimant is entitled to benefits by virtue of the unrebutted presumption.

VI

Applying the presumption in this way to the appeals before us, I would decide them as follows.

A

Stapleton. I would affirm the denial of benefits though not on the basis relied upon by the majority.

The ALJ improperly found the presumption invoked by virtue of the single positive X-ray reading, without considering the several negative X-rays. The Benefits Review Board, however, properly upheld the denial of benefits on the alternative ground that the presumption should not have been found invoked under (a)(1) by reason of the negative X-ray evidence, or that if invoked under (a)(2) or (a)(4) it was sufficiently rebutted by medical testimony establishing that claimant's impairment was cardiac in origin.

B

Ray. I would affirm the denial of benefits.

The ALJ's determination that the presumption was not invoked under (a)(1) because of the overwhelming weight of seven "B" readers' negative readings in relation to one unidentified reader's positive reading and another's reading only of "suspicious for early pneumoconiosis" is supported by substantial evidence.

Similarly, the ALJ's determinations that, on conflicting test results, the presumption was not invoked under (a)(2), and that on conflicting medical opinion, it was not invoked under (a)(4), are also supported by substantial evidence.

C

Cornett. I would affirm the award of benefits but remand for calculation of interest.

The ALJ's finding that the presumption was invoked

under (a)(1) on conflicting X-ray readings is dubious. However, the finding that the presumption was invoked under (a)(2) by qualifying and near-qualifying blood gas studies, notwithstanding the evidence of non-qualifying results, cannot be reversed for lack of substantial evidence. Neither may we reverse for lack of substantial evidence the finding that, on conflicting medical testimony as to the degree of disability and as to its source, the presumption of total disability from pneumoconiosis was not rebutted.

I am authorized to say that Judge Russell, Judge Murnaghan, and Judge Ervin join in this opinion.

SPROUSE, Circuit Judge, concurring:

I concur in Judge Hall's opinion. That opinion, with the author's characteristic clarity of style, correctly resolves the black lung presumption issues in a manner which both advocates and claims adjudicators would easily understand. I write separately only to respond to several issues raised in Judge Phillips' opinion. I feel it tends to confuse the issues by trying to form into a traditional mold an evidentiary scheme designed by Congress to be singularly untraditional.

I.

The first task in our appellate review of these consolidated cases is to determine the Secretary's meaning when he published the presumption regulation. If we can determine that meaning, then we, of course, give deference to it unless it is clearly erroneous. *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). If, as Judge Phillips concludes, the Director's[1] interpretation of section 203 as contained in his brief were of the character that required judicial deference, we must accept that meaning unless it is contrary to the statute authorizing it. Our only task in that event would be to determine if that interpretation exceeded the authority delegated by Congress.

In my view, however, the Director's contentions advanced here as a litigant are not entitled to deference as an ex-

[1]The Secretary of Labor is the delegated authority to administer the relevant portion of the Black Lung Program and he promulgated the regulations which we now review. The Director of the Department's Workers' Compensation Program is the Secretary's designated adminstrator.

pression of the regulation's meaning. The posture of the Director on this appeal is essentially that of an advocate. Having received permission to intervene, he has briefed his arguments as to the meaning of the regulation creating the interim presumption. He makes no contention in his brief that he has previously or consistently interpreted the regulation as he now interprets it as an advocating party. To accept such a bald litigation statement as a binding agency interpretation is, to me, an ill-conceived application of the "deference rule."

I feel that Judge Hall's opinion captures the exact meaning of the regulation and that the position advanced by the Director is contrary to its purpose. This conflict becomes apparent upon examination of the Secretary's actions in promulgating the regulation together with a review of the statute and congressional intent in enacting its various sections. Since Judge Phillips places such great reliance on deference to the Director's position, however, I feel it important to divert here from the main thesis of my concurring opinion to explain why I think the Director's appeal position is not entitled to the judicial deference described in *Bowles* and its progeny.

In *Bowles*, the Supreme Court articulated the now frequently quoted rule that:

> a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

325 U.S. at 414. The Court did not then nor has it since, however, described the type of interpretative action which

is of sufficient dignity and reliability to deserve such preclusive judicial deference. In fact, the simplicity of the *Bowles* statement belies the extremely complex problem of judicial review of administrative regulations generally and of review of an agency's interpretation of its regulation in particular. One commentator has stated that the deference rule is not only a series of rules, but that a court's choice in using them *vel non* is frequently dictated by the result oriented inclination of some judges or justices.[2] *See also* 2 K. Davis, *Administrative Law* § 7.22 (1979). Applying the *Bowles* decision, many courts, including this one, will not defer to an agency's interpretation of its previously issued regulations unless that interpretation has been

[2]Weaver, *Judicial Interpretation of Administrative Regulations; The Deference Rule,* 45 U. Pitt. L. Rev. 587 (1984). The author states:

> The Supreme Court has never acknowledged the fact that it has created multiple deference standards. Instead, when it wants to apply the deference rule, it simply chooses one of the deference standards and acts as if that one is the *only* standard. Thus, the Court never explains either why it has chosen one standard over another or when each should be applied. The Court has indicated that the "demonstrably irrational" standard, a controlling standard, is of limited applicability. However, it appears to treat the "plainly erroneous" standard as generally applicable, even though it is also controlling, and it gives an administrative interpretation as much deference as the "demonstrably irrational" standard. Furthermore, the Court has not indicated when the "plainly erroneous" standard should be applied as opposed to the "reasonable, consistently applied" standards, or some non-controlling one such as the "greatest weight," "deference," and "respect" standards. Each of these latter standards appears to be generally applicable.

Id. at 595. (emphasis in original) (footnotes omitted).

"reasonably and consistently applied." *Burnley v. Short,* 730 F.2d 136, 139 (4th Cir. 1984); *Allen v. Bergland,* 661 F.2d 1001, 1004 (4th Cir. 1981); *see also United States v. Board of Supervisors of Arlington County,* 611 F.2d 1367, 1372 (4th Cir. 1979). That requirement certainly makes sense considering the significant changes an agency could effect under the guise of interpretations.[3] The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1982 & Supp. 1985), imposes restraints on an agency's authority to make such changes. Section 552(a) provides that an agency interpretation of general application shall not be binding unless it is published in the Federal Register. 5 U.S.C. § 552(a)(1)(D) (1982). Likewise, section 552(a) provides in part that

> A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if [it has been in-

[3]Weaver has observed:

> Political considerations may also discourage an agency from interpreting its regulations consistently and fairly. Often a regulation is promulgated by an agency under one presidential administration and then interpreted by that agency under a subsequent administration. If the regulatory philosophy of the later administration differs from that of the promulgating administration, an agency may alter its interpretation of its regulations. Such shifts in regulatory philosophies are not uncommon. Evidence of alternating political philosophies appears in the transition from the Johnson administration to the Nixon, Ford, Carter, and Reagan administrations. Without drawing any conclusions about the desirability of any particular regulatory philosophy, the fact remains that agencies will change their interpretations of regulations over time.

Weaver, *The Deference Rule, supra* note 2, at 612-13 (footnotes omitted).

> dexed and published or a party has actual and timely notice of its terms.]

5 U.S.C. § 552(a)(2)(C) (1982). While the relationship between these provisions under section 552 and the deference rule is not fully developed, these APA sections nevertheless illustrate the problems inherent in agency attempts to establish interpretation by intervening in litigation. There is no notice to affected members of the public that a regulation is to be interpreted in a new or controversial way. Logic and principle dictate that an agency's interpetative action be undertaken with some formal dignity.

It is true that an agency acting in the capacity of an adjudicator is usually allowed to initially interpret its regulations during the adjudication of the rights affected by the agency action. That is quite different, however, from the agency acting as a party litigant offering its litigation position for the first time as the official interpretation of the regulation in issue. This is precisely what happened here.[4] I hesitate to extend the concept of deference so as to permit any agency in such a posture effectively to resolve appeals by its own actions. This would abdicate much of the responsibility for appellate review of federal administrative agencies to the agencies for self review. I do not think *Bowles* contemplates such a result. Rather, agencies should be able to present their views in persuasive efforts but should only be able to present them as settled law if the

[4]In this case, we granted the Director's motion to intervene. There is a question in my mind, however, whether such motion is necessary because he may have standing as a matter of right in every appeal. The Act provides: "[t]he Secretary shall be a party in any proceeding relative to a claim for benefits under part (C)." 30 U.S.C. § 932(k) (1982). *See Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 676 F.2d 110, 113-14 (4th Cir. 1982).

interpretations have been previously and consistently applied.

Therefore, we should interpret the regulation under review either from its plain meaning or by utilizing rules of statutory construction including rules relating to the documented intent of the drafters.

II.

I agree with my colleagues that the meaning of the regulation is not facially obvious. It is appropriate, therefore, to examine other sources including the statute and its legislative history for assistance in discerning its meaning. If we were to accept Judge Phillips' view of deference, we would look to see if the Director's interpretation is contrary to the statute. Accepting my view, it is helpful to look at the statute and its legislative history because they had a direct bearing on the substance of the regulation. Thus under either approach, it is necessary to examine the statute and, due to its complexity, its legislative history. An examination of legislative history is particularly appropriate here because the circumstances surrounding the drafting and promulgation of the interim presumption regulation represent an unusual turn in administrative law. Contrary to the usual interpretative posture, agency intent here can be inferred directly from congressional action because congressional staff worked directly with the Labor Department to tailor the final version of the interim presumption.[5] The tailoring was detail-

[5]Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. VA. L. Rev. 869 (1981). The author states:

> The final draft of the Labor Department's regulations were approved within the Department and, prior to publication, sent to selected congressional staff members for review and

ed. Importantly, in this process congressional staff struck from preliminary drafts of the regulation a proposed provision requiring the weighing of all medical test evidence to invoke the presumption. Solomons, *supra* note 5, at 896 n.138. Additionally, the Labor Department would have triggered the presumption with fifteen years mine employ-

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presumably for approval. These regulations were reviewed by both congressional staff and professional persons associated with the various black lung associations. As a result of this initial review, the Department's proposed "interim presumption," after close scrutiny, was severely criticized, thus failing to win the approval of those reviewing the proposal.

Id. at 896. In particular, Solomons notes:

> One of the proposed sections would have prohibited the approval of a claim unless the file demonstrated that a full series of medical tests had been conducted. The Black Lung Association and congressional staff objected strenuously and the section was removed. *Another provision would have required the adjudicator to weigh all the medical test evidence to determine whether the weight of this evidence established total disability. This too was stricken by congressional command.* One very important section in the draft attempted to clarify the confusion over whether qualifying pulmonary function studies would invoke the interim presumption with 15 or 10 years of coal mine employment. The SSA presumption seemed to require 15 years but in practice SSA awarded benefits with qualifying pulmonary function scores and 10 years. The draft Labor presumption required 15 years. The clarification was also vetoed by the group in favor of the SSA practice of using 10 years for this purpose.

id. at 896 n. 138 (emphasis supplied). Finally, Solomons observes:

> In light of the severe criticism evoked by these proposed regulations, the Department of Labor sought to formulate more acceptable regulations. This was accomplished and the new interim standards were published as a proposal on April 25, 1978.

Id. at 897. Mr. Solomons was counsel for the involved Labor Department Branch from 1973-1978 when the regulation was drafted.

ment. Congressional staff reduced the minimum service to ten years. *Id.* With or without deference to the Director's position, then, the statute and Congressional intent in drafting it is a focal point of this appeal.

Turning now to the regulation, the starting point for determining its meaning is the language itself. Section 727.203 provides:

> § 727.203 **Interim presumption**
>
> (a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis . . .;
>
> (2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than [certain values specified in the regulation's tables;]
>
> (3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than [certain values specified in the regulation's tables;]
>
> (4) Other medical evidence, including the documented opinion of a physician exercising

reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment; . . .

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work. . .; or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work . . .; or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

20 C.F.R. § 727.203 (1985).

The Secretary designed section 203(a) to give the coal miner the liberal advantages mandated by Congress, and section 203(b) to preserve to the mine employer its rights by rebuttal to present all probative evidence relative to its defense of the claim. It is difficult to consider the meaning of section 203(a) without considering section 203(b) because they were designed as integral parts of one scheme. The Director's position on the meaning of section 203(a) varies crucially from Judge Hall's interpretation in which I enthusiastically join. There is, however, virtually no difference between our opinion concerning the meaning of section 203(b) and the interpretation placed on that sub-

section by the Director on this appeal. Moreover, Judge Phillips' opinion seriously misinterprets the Director's briefed interpretation of section 203(b) — further complicating our holdings. In sum I agree with Judge Hall that a claimant, to invoke the presumptions provided by section 203(a), must only produce one positive x-ray, one positive pulmonary function test, one positive blood gas study, or one reasoned medical opinion. I believe that the Director's position requiring proof of the invoking presumption by a preponderance of the evidence is not only erroneous under an interpretation of the regulation's language, but that it is contrary to the Congressional authority delegated to the Secretary of Labor to promulgate this regulation. In my opinion, however, Judge Hall's opinion concerning the meaning of section 203(b) is essentially the same as that advanced by the Director. The interpretation of section 203(b) espoused by Judge Phillips is contrary to the position of all parties to this appeal, including the Director.

The relevance of section 203(a)'s language was succinctly explored by Judge Hall and announced in a way that presents a useful tool for the statute's future utilization. On the other hand, Judge Phillips' attempt to universalize language designed to cover one specific social problem confuses the issue. The unique juxtaposition of concepts faced by the drafters of section 203(a) provides lively ammunition for academic exercise, but it seems to me that there is sufficient challenge in the more focused task of determining what the regulation means in light of the social ill it attempts to rectify. I find the straightforward meaning attributed to the language by Judge Hall ideal for this purpose.

Judge Phillips, however, postulates that all x-rays must be weighed by the factfinder and the presumption only triggered if, in his opinion, a preponderance of the x-ray evidence proves pneumoconiosis. If the pulmonary function, blood gas or reasoned medical opinion category is used to invoke the presumption, it must be proven to the factfinder's satisfaction that all of the evidence in that category preponderates, proving that the claimant has either pneumoconiosis or a totally disabling respiratory or pulmonary impairment[6]

Congressional direction aside, Judge Phillips' conclusion that a triggering or invoking category must be proven by a preponderance of the evidence misconstrues both the language of the regulation and the nature of the presumption. The most striking example of this is the conclusion that section 203(a)(1) requires a trier of fact to weigh all x-rays and find from a preponderance of x-ray evidence that a claimant has pneumoconosis before triggering a *presumption* that he is afflicted with the disease.[7]

The language could not be clearer.

> (a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least ten years will be presumed to be totally disabled due to pneumoconiosis . . . . if one of the following medical requirements is met:
>
> (1) *A* chest roentgenogram (x-ray), biopsy, or

[6]The Labor Department's proposed regulation would have included a similar requirement for weighing, but this provision was stricken at the insistence of congressional staff. Solomons, *supra* note 5.

[7]Judge Phillips' conclusions as to § 203(a)(2) and (3) are equally erroneous. My reasoning in *Consolidation Coal Co. v. Sanati*, 713 F.2d 480, 483 (4th Cir. 1983) (Sprouse, dissenting), was also erroneous in this respect. I am well persuaded by Judge Hall's reasoning on page 19 of his opinion.

> autopsy establishes the existence of pneumoconiosis . . . .

20 C.F.R. § 727.203 (emphasis is supplied).

It is easy to fault legislative draftsmanship, but if, as Judge Hall would hold, the drafters of this regulation intended only one x-ray to trigger the presumption, I cannot think of a better or simpler way of saying it. On the other hand, to hold that the drafters intended a preponderance standard to apply would be to accept section 203(a)(1) as an example of intolerable drafting.

With all respect, I feel that Judge Phillips' extrapolation of his section 203(a) "preponderance" requirement in paragraph 4 of part II of his opinion disproves rather than establishes the validity of his theory. He reiterates that a presumption would be triggered *vel non* by weighing all of the x-ray evidence under section 203(a)(1) and deciding from a preponderance of that evidence whether the claimant was proven to have pneumoconiosis. If he is *proven* to have pneumoconiosis and has ten years of coal mine employment, then he is entitled to the benefit of the presumption. According to this theory, the coal mine employer may then defend under only three rebuttal provisions of section 203(b) instead of all four, i.e., (1) doing his usual coal mine work, (2) is able to do his usual work, or (3) disability not caused by coal mine work. The employer may not defend on the basis of section 203(b)(4) that he does not have pneumoconiosis because pneumoconiosis has already been proven by a preponderance of the x-ray evidence at the invocation stage.

In the same vein, Judge Phillips concludes that once the presumption is invoked under section 203(a)(4) ("other medical evidence" of a totally disabling respiratory or pulmonary impairment) the employer is entitled to defend

under section 203(b)(3) not caused by employment and (4) does not have pneumoconiosis but cannot rely on section 203(b)(1) working in coal mine or (2) able to work in coal mine.

One problem with that syllogistic formulation is that it is internally inconsistent. Judge Phillips would eliminate the regulation's allowance of rebuttal possibilities (b)(1) and (b)(2) when the presumption had been invoked by section 203(a)(4) because if a miner is totally disabled, he is unable to work. By the same token, however, if a miner has proven that he has pneumoconiosis by x-ray, he is, by virtue of ten years of coal mine employment, presumed to be totally disabled and equally unable to work. To be consistent then, once a claimant *proves* pneumoconiosis by x-ray at the invocation stage, the employer should be stripped of three of his defenses and could rely only on section 203(b)(3).[8]

[8]I recognize Judge Phililps' *sua sponte* division of the presumptions as explained in the text of his opinion and in his footnote 5. No one could disagree that the fundamental nature of a presumption presupposes facts upon which the presumption is to be based and the presumed effect whether it be a presumed legal effect or a presumed factual effect. I, like Judge Hall, simply cannot agree, however, that a presumption can be split into operating on basic facts on the one hand and presumed facts on the other in such a manner as to defeat the purpose of the presumption. This can be done easily with any presumption as Judge Phillips has done by simply assigning attributes to the basic facts which were not conceived by the designers of the presumption. In the first place, I do not recognize this subdivision of the presumption regulation as the position of the Director or of any party. It is certainly not to be found in any of the regulatory language nor in the Director's interpretation contained in his brief. A proper function of a court, to be sure, may be to devise new ways to solve old problems and I do not quarrel with that. In this instance, however, I feel it contravenes the meaning of the statute directing the Department of Labor to design these regulations and the intention of the Director in designing them. As I indicate, *infra*, the fact of ten years or more employment was considered to be probative of the presence of pneumoconiosis, its disabling effect, and its coal mine causation. the showing of

The section 203(a) "preponderance" theory espoused by Judge Phillips, moreover, is inconsistent in a more direct sense. Again, the extrapolation in paragraph 4 of Part II of his opinion illustrates the problem. The Secretary, at the prodding of Congress, designed a proof scheme which corrected perceived inequities suffered by claimants by providing them with evidentiary advantages. The regulation preserved, as constitutionally required, the right of the private party employer to defend claims, albeit from a restructured evidentiary scheme.[9] There is no indication

pneumoconiosis or a total respiratory disability by the means expressed in § 203(a)(1)-(4) also was meant to be probative of but not proof of coal mine related, totally disabling pneumoconiosis. neither this triggering data nor a combination of such data is irrebuttable because it is emphatically provided that the combined effect is to raise a presumption which can be rebutted by utilizing all relevant evidence in accordance with § 203(b). I can only conclude from all of this that the presumptions are unitary; it takes a combination of ten years plus satisfying one of the categories to invoke the presumption. Both the ten year increment and an x-ray, pulmonary test, blood gas test or other medical evidence have probative values relating to all three elements of the presumption, i.e., disease, disability and causation. In one sense, Judge Phillips' theory would convert the rebuttal presumption to an irrebuttable one. Another view, however, is that in *proving* pneumoconiosis at a place designed for mere invocation of a presumption, a claimant has (given the ten years of employment) proven his case – that he is totally disabled from pneumoconiosis as a result of coal mine employment.

[9]Congress was well aware that medical evidence in black lung cases generally is treated differently at every stage than in traditional litigation. In the first place, there is very little testimony and opportunity for cross examination. Ninety-five percent of all medical evidence consists of doctors' reports received by the ALJ without the doctors' presence at the hearing. Smith, *The Basics of Federal Black Lung Litigation,* 83 W. Va. L. Rev. 763, 788-89 (1981). In appropriate instances, the ALJ should weigh the medical reports and decide medical issues on a proponderance standard. There is no realistic way to enforce that standard, however, since necessarily administrative and judicial bodies affirm the factfinding if there is only substantial evidence to support it.

that what were created are highly sophisticated presumptions or that they came to fruition only after long metaphysical introspection by their designers. They are simply presumptions designed to accomplish two basic purposes. The first is to compensate for the deficiency of traditional evidentiary rules, under which it was not always possible to accurately portray pneumoconiosis. The second is to switch the burden of proof to the defendant employer so as to make it easier for miners to receive benefits. The Director's litigation position, which Judge Phillips adopts, would turn this design on its head. As Judge Phillips concedes, if a weighing of the x-rays at the presumption-invoking stage would *prove* the existence of pneumoconiosis, that part of the proof scheme could not be disproved on rebuttal. Similarly, once total respiratory disability is *proved* in invoking the presumption, it cannot be disproved on rebuttal. That result is simply impossible to square with the thoughtfully created design of the regulation, which requires the erection of presumption only in the first (section 203(a)) stage but unconditionally allows the employer to rebut the presumption under the second (section 203(b)) stage. The structuring of section 203 into two parts clearly contemplates that any ultimate proving is to be accomplished only in the second (section 203(b)) stage.

A presumption, whether you view it as evidence or as a consequence of evidence, is not ultimate proof. It is part of the equation that results in ultimate proof. Assuming there is rebuttal evidence, the ultimate proof under the section 203 scheme is decided in the rebuttal stage. Nothing could be clearer. To require ultimate proof in the invocation stage not only shifts the burden of proof, placing it on the claimant, but enmeshes in frustration the defenses allotted to the employer. The regulation allows

the employer to defend on four basic grounds. Judge Phillips' theory could reduce these to only two grounds.[10]

Judge Phillips asserts that the Director's briefed position does not offend "known patterns of presumptions." The truth is that there is very little pattern to presumptions

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[10]There is yet another failing to this "preponderance on invocation" reasoning. Judge Phillips reasons that a "(b)(4)" defense cannot be raised in rebuttal to an "(a)(1)" presumption; and that "(b)(1) & (2)" defenses cannot be raised in rebuttal to an "(a)(4)" presumption. This fails to recognize the basic interrelation between presumptions and evidence. According to the Director's briefed position, a number of x-rays are weighed, and a presumption invoked by a preponderance of the evidence. Judge Phillips goes even farther and would hold that this would irrebuttably prove pneumoconiosis to the exclusion of any rebuttal evidence.

Section 203(b), however, states that all relevant evidence can be considered on rebuttal. It is true that nothing would be gained by weighing all x-ray evidence at invocation and, again, on rebuttal, but x-ray evidence is only one type of medical evidence bearing on the factual issue of pneumoconiosis. A lung biopsy or autopsy, for example, would be superior evidence. Section 203(b)(2) & (3) test results accompanied by appropriate supporting documentation would not be direct evidence of pneumoconiosis but would be circumstantial evidence probative of its presence *vel non*.

Likewise, a doctor's opinion of total respiratory disability is one kind of evidence of inability to work – there are several other types of medical and nonmedical evidence which might counter the medical evidence. Section 203(b) preliminarily speaks to relevant medical evidence, but 203(b)(2) speaks only to relevant evidence generally. In other words, under the proof scheme originally conceptualized by the regulation, a part of the factfinder's function in the section 203(b) rebuttal phase is to weigh one kind of evidence against another. Judge Phillips' extrapolation would limit this function and make it more difficult both for a claimant to invoke a presumption and for an employer to rebut it. The regulation is designed to have the exact opposite effect. The presumption is to be easily invoked, but the employer is to have wide latitude in presenting its rebuttal evidence.

generally.[11] Nothing in the general nature of presumptions provides clues as to whether a particular presumption can be invoked by the production of a single basic or operative fact or whether a number of such facts must be weighed under a preponderance standard in order to get the presumption's benefit. That determination is often inherent to the field of law to which the presumption is attached. It is certainly inherent to the subject matter which it affects.[12] In any event, if any legal tool can be said always

[11] *See* Allen, *Presumptions in Civil Actions Reconsidered,* 66 Iowa L. Rev. 843, 843 (1981), wherein the author states:

> The longstanding controversy over the nature and proper rule of presumptions in civil actions continues undiminished, and the confusion generated by the controversy similarly shows no signs of abating.

All the standard texts on evidence, of course, discuss not only the various attributes of presumptions, but the confusion that surround [sic] them. Professor Allen in his article, however, articulates a more basic approach for considering and using presumptions. One statement in his article is particularly applicable to this case:

Moreover, it is the failure to recognize that the word "presumption" is simply a label applied to a range of evidentiary decisions that has caused essentially all the confusion and controversy surrounding presumptions, as well as doomed to failure the extensive efforts to elaborate on the nature of presumptions. Rather than engaging in the futile task of attempting to reconcile the many usages of the word "presumption," efforts would be better spent by analyzing the evidentiary problems that underlie the use of the label.

Id. at 845. See also McCormick, *Evidence* § 342 et seq. (3d ed. 1984); 1 Weinstein, *Evidence* ¶ 300 *et. seq.* (1985).

[12] Presumptions are both legislatively and judicially created. They are varied and difficult to categorize much less compare, and they take the legal coloration of the field of law in which they apply. *See generally* 1Weinstein, *Evidence* ¶300 *et seq.* (1985). The most superficial research reveals why they are difficult, if not imposible, to characterize. Examples demonstrating this are: *GENERALLY:* a person acting in public office was regularly appointed to it. Official duty has been regularly performed. A court, or judge acting as such,

to operate *sui generis,* it is the much varied presumption. Here, Congress exhaustively examined the reasons for establishing the presumptions. Congress instructed the Social Security Administration generally and the Labor Department specifically concerning the basis of the regulation establishing the presumption. Generally, the substantive law to which it is attached will provide some clues as to how a presumption operates. Here, Congress not only created the substantive law but labored long to instruct the agencies on its procedural application.

The Black Lung Act was a response to many congressional concerns. The language is correspondingly com-

whether in this state or any other state or country, was acting in the lawful exercise of the jurisdiction of the court. Evidence willfully suppressed would be adverse to the party suppressing it. A person is the same person if the name is identical. A person not heard from in seven years is dead. A death occurring from unexplained and violent external means is accidental. When a test reveals presence of drugs in a harness horse, rebuttable presumption exists that trainer was culpable and may be suspended. *CONTRACT:* Payment of earlier rent or installments is presumed from a receipt for later rent or installments. An obligation delivered to the debtor has been paid. Private transactions have been fair and regular. The ordinary course of business has been followed. A promissory note or bill of exchange was given or indorsed for a sufficient consideration. An indorsement of a negotiable promissory note or bill of exchange, was made at the time and place of making the note or bill. A writing is truly dated. A letter duly directed and mailed was received in the regular course of the mail. Money paid by one to another was due to the latter. *REAL ESTATE:* Owner of legal title is the owner of full beneficial title. An uninterrupted adverse possession of real property for a period of years has been held pursuant to a written conveyance. *DOMESTIC RELATIONS*: A child born in lawful wedlock is legitimate. *CRIMINAL*: An accused is innocent until his guilt is proven beyond a reasonable doubt. An accused is presumed to be sane. Persons are presumed to know the law of the state in which they reside. *TORT:* A person intends the ordinary consequences of a voluntary act. When there is a statutory violation, negligence is presumed. When there are no eyewitnesses, the claimant in an accident exercised due care.

ministration. . . or the United Mine Workers of America, but was initiated and conceived by Congress itself." 5 *Coal Law and Regulation* 100-5 to -6 (P. McGinley & D. Vish ed. 1985). Congress was concerned that this social problem had been neglected for over a century and its actions demonstrate its intention that the administrative agencies in charge of the program act with extraordinary dispatch.

Testimony before the Senate Labor and Public Welfare Committee summarized a grim report from the U.S. Public Health Service. During the Senate debate on the 1969 Act, Senator Javits included in the record of the debate an excerpt of that testimony:

> . . . in 1950, American coal miners died at nearly twice the rate of other workers; diseases of the respiratory system killed miners at a rate five times greater than the general working male population; and the mortality rate for American coal miners was roughly twice those reported for British coal miners.

Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, 94th Cong., 1st Session, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173) As Amended Through 1974 Including Black Lung Amendments of 1972* (Comm. Print Aug. 1975) [hereinafter cited as *1975 Legislative History]*, at 523.

Senators and House members expressed their feelings of shock and concern at these and similar grisly statistics. E.g., remarks of Senator McGee, *id.* at 580; remarks of House Education and Labor Committee Chairman Perkins, *id.* at 1279. Senator Javits said: "[T]his [black lung amendment] is an unusual and dramatic proposal — but it is directed at an unusual and dramatic problem — our sub-

lime insensitivity to what is probably the worst occupational disease in the country – black lung." *Id.* at 522.

From the time Title IV, dealing with black lung, was added to the Coal Mine Health and Safety Act, it was obvious the Congress felt that this legislation was unique in practically every respect – never before or since has Congress chosen a single occupational disease or for that matter a single industry for specialized federal treatment and compensated its victims despite the fact that industrial side effects from other occupations have been devastating to other groups of Americans. H.R. Rep. No. 770, 94th Cong., 1st Sess. 89 (1975) (minority views); *See* Solomons, *supra* note 5, at 914-15. This is the congressional and regulatory atmosphere which generated the regulations. Congress was determined to compensate black lung victims in a specific way, and to motivate the removal of any administrative obstacle impeding that intention. *See* Solomons, *supra* note 5, at 884-95, 915.

Although the regulation, the meaning of which now divides our court, is a regulation promulgated by the Secretary of Labor as the congressionally delegated administrator of the program, it originated as an interim regulation of the Social Security Administration when that agency administered the program. In the initial period of administration, few black lung claims were approved. Solomons, *supra* note 5, at 873. Members of both Houses intervened to speed processing and greatly increase the percentages of claim approvals over claim denials.[13] The Social Security Administration and subsequently the La-

[13]An approval rate of 50% under the SSA fell to only 10% under the Department of Labor administration of the Act prior to the 1977 amendments. Stephens & Hollon, *Closing the Evidentiary Gap*, 83 W. Va. L. Rev. 793, 817 (1981); Solomons, *supra* note 5, at 873 n.14.

bor Department responded to these congressional initiatives, both by implementing new general policies, and by enacting specific regulations and procedures. Senators Byrd, Randolph, Javits, Taft and Williams, and Congressman Perkins, Dent, and Flood, were not only actively shepherding the legislation and its various amendments through Congress, but were looking directly at the agencies charged by Congress with the program's administration. The entirely unique impetus given all of the black lung legislation was due for the most part to the converging circumstances whereby leading legislators of both Houses of Congress were specifically interested not only in the statutory provisions but the manner in which benefit claims were administered. Solomons, *supra* note 5, at 876, 915.

Against this background, Congress undertook, through hearings and legislative debate, to examine the reasons claims were being denied in numbers it thought to be excessive. The congressional inquiries were detailed and concentrated on the proof schemes utilized first by the Social Security Administration and later by the Department of Labor. The hearings produced criticism of a number of evidentiary rules and adjudicatory procedures. The denial of claims on the basis of x-rays, pulmonary function tests and blood gas studies, which were thought not to provide a sufficiently reliable basis for denying claims, received the greatest congressional scrutiny.

Floor debates in both the House and Senate over a several-year period demonstrate the depth and detail of Congressional interest in this specific aspect of the program. Remarks by Senator Taft and Congressman Perkins were illustrative. During consideration of the 1972 Amendments, Senator Taft said:

> [It] is clear that a negative x-ray does not establish the absence of pneumoconiosis. Autopsies of coal miners indicate that pneumoconiosis does exist in a great nubmer of cases where the chest X-ray was negative. Testimony has indicated that there is an error factor of approximately 25 percent in diagnosis when the X-ray alone is used.

1975 Legislative History at 2019-20. In 1976, during House consideration of the precursor to the legislation which became the 1977 amendments, Chairman Perkins said:

> Unfortunately, the state of medical knowledge as to the diagnosis of black lung is such that often it cannot be determined until an autopsy has been performed. Not all lungs response [sic] in the same fashion to the inhalation of dust particles. Some whose lung X-rays clearly evidence the disease to a disabling extent do not appear to be disabled. The lungs of others with a long history of service in an underground coal mine produce only inconclusive X-ray findings yet manifest obvious respiratory difficulties and render such miners unemployable.

House Comm. on Education and Labor, 96th Cong., 1st Sess. *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print Feb. 1979) [hereinafter cited as "*Legislative History of 1977 Act*"], at 231 (Statement of Chairman Perkins during Floor debate on H.R. 10760, 94th Cong., 2d Sess. (1976)).

These opinions were based on committee testimony received during extensive hearings. In hearings of the House Education and Labor Committee prior to consideration of H.R. 10760, the Committee had heard the following testimony:

> Finally, the reliance upon a negative result of a blood gas study to exclude disability, which is what I understand the language of the bill is, is unwise. This would tend to exclude the man who has moderately severe obstructive impairment of his ventilatory capacity but who maintains relatively normal arterial blood gases; such a situation occurs rather frequently in emphysema.

Bills To Revise the Black Lung Benefits Program: Hearings on H.R. 7, H.R. 8, and H.R. 3333 Before the Subcom. on Labor Standards of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 107 (1975) [hereinafter cited as "*1975 Hearings*"] (statement of Dr. Leroy Lapp, West Virginia Medical Center). Dr. Lapp also testified that there was no type of medical examination that would positively say whether a claimant is entitled or not entitled to benefits. *Id.* at 110.

In the report accompanying the 1977 amendments, the House Education & Labor Committee stated:

> Other diagnostic tools for determination of eligiblity on a case-by-case basis are similarly limited. The lung function tests have shown impairment of lung function but impairment by this test has been slight and results vary widely. Lung function tests measure only the person's ability to move air in and out of their lungs and do not measure the basic function of the lung . . . . Other diagnostic tools . . . are inadequate for other reasons.

H.R. Rep. No. 151, 95th Cong., 1st Sess. 32 (1977).

A number of other medical witnesses testified that respiratory diagnostic tools simply were not as effective in the presence of pneumoconiosis as they were in other respiratory diseases. The general medical consensus was that

diability determinations could only be developed from a total assessment of a miner's medical condition, particularly by physicians who were familiar with the patients over a period of time. Finally, several congressmen announced that their positions were influenced by a random survey which showed that the autopsies of two hundred deceased coal miners revealed presence of pneumoconiosis in twenty-five percent of them even though x-rays contained in their medical records were negative for the disease. *1975 Legislative History* at 2020-21 (statement of Senator Taft), 2069 (statement of Senator Spong).

Amidst congressional admonitions and directions, the Social Security Administration promulgated the interim regulation which was the direct predecessor to 20 C.F.R. 727.203 – the Labor Department regulation now under review. The Social Security Administration designed and issued the regulation in response to severe congressional criticisms that although positive x-rays, pulmonary function tests, and blood gas studies were probative of pneumoconiosis in some form, negative results of those tests were not necessarily probative of an absence of pneumoconiosis. Congressmen referred to numerous medical opinions and statistical surveys to that effect.

In the 1977 amendments, Congress, in assigning the administration of Part C claims to the Department of Labor, gave that agency authority to promulgate regulations, but at the same time circumscribed the authority with statutory directions. It instructed the agency on how to structure its regulations in several specifics, including a mandate that regulations governing Part C claims:

> shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such

> claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

30 U.S.C. § 902(2) (1982). The House of Representatives Education and Labor Committee in reporting the bill noted that the Part C interim presumption could be more liberal but not more conservative than the then existing interim presumptions. H.R. Rep. No. 151, 95th Cong., 1st Sess. 41 (1977). In enacting section 402(f) with the "no more restrictive language" Congress was, of course, aware of its own studies, its admonitions to the Social Security Administration and the Labor Department, the circumstances and reasoning of the Social Security Administration and existing case law. *Eg., Prokes v. Mathews,* 559 F.2d 1057 (6th Cir. 1977); *Bozwich v. Mathews,* 558 F.2d 475 (8th Cir. 1977); *Henson v. Weinberger,* 584 F.2d 695 (7th Cir. 1977); *Ansel v. Weinberger,* 529 F.2d 304 (6th Cir. 1976). Lacking confidence that the Department would respond even to all of that, Congressional staff worked directly with the Department in shaping the regulation to Congressional intention. *See* Solomons, *supra* note 5, at 896-97.

Establishing a positive x-ray, pulmonary function, or blood gas study, of course, is only one-half the requirement for triggering the presumption – the claimant also must have worked in a coal mine for at least ten years. Contrary to Judge Phillips' view, it is the combination of the ten-year employment and a positive test result that triggers the presumptions. At the same time Congress was investigating the failure of traditional evidentiary rules to function properly in black lung claim resolution, it was investigating the effect of the period of exposure on the probability that a coal miner suffered from pneumoconiosis, and found a demonstrable causal relationship with all

three elements of a claim.[14] The ten-year employment period was legislatively conceived to be some indication

[14]During the three years in which Congress considered the various precursors of the 1972 Amendments, it received a great deal of testimony about the correlation between the period of exposure and the evidence of the disease.

Dr. Murray V. Hunter, Medical Director, Fairmont Clinic, Fairmont, West Virginia, testified before the House Education and Labor Committee, that exposure over time produces pneumoconiosis and that presumption of disability because of exposure over time represents sound policy. *1975 Hearings,* at 171.

At the 1975 hearings on various black lung amendment proposals, Dr. Dan Fine, New Kensington Miners Clinic, stated:

> . . .and accepting the reasonable presumption that deposition of coal and silica and other minerals in the lungs is a deleterious body burden, it would seem eminently fair and humane to recognize as a matter of law that the passage of a given number of years as a coal miner is, in and of itself, reasonable evidence of a substantial burden of lung damage from coal mining and to compensate the miner accordingly.

1975 Hearings, at 117.

Congressman John Erlenborn was the principal spokesman for the opposition to Black Lung provisions including those relating to the interim presumptions. He protested that the interim presumptions, in effect, created an automatic entitlement based on years of employment alone. H.R. Rep. No. 770, 94th Cong., 1st Sess. 99-102 (1975); (separate views of Congressman Erlenborn); H.R. Rep. No. 151, 95th Cong., 1st Sess. 94-96 (separate views of Congressman Erlenborn).

Congressman Paul Simon, in supporting the bill, noted that an autopsy study of 400 coal miners with 21 years or more in the coal mines showed that 90-95% of them had pneumoconiosis. *Legislative History of 1977 Act,* at 282-83 (statement of Congressman Simon on House Floor in 1976 in support of H.R. 10760, legislation similar to legislation which in the following Congress became the 1977 act).

In its report accompanying the 1977 amendments, the House Education and Labor Committee wrote:

> There is some autopsy data that provides a basis for some important and more reliable conclusions. Data collected from 405 autopsies as part of the National Coal Workers Autopsy Study at the Appalachian Laboratory for Occupations Respiratory Diseases (ALFORD) shows that of all the miners examined, 84 percent had CWP. When these autopsies were arranged by years worked underground, there was a sharp increase in the percentage of cases after fifteen years, with those with less than fifteen years underground showing 64 percent with CWP and those with more than fifteen years underground showing 88 percent with CWP.

H.R. Rep. No. 151, 95th Cong., 1st Sess. 31 (1977).

disability, its severity and causation – some evidence that the miner not only had pneumoconiosis, but that it was disabling and caused by his coal mine employment.

Seining these murky waters is by no means simple, but I think the language and structure of the regulation, the subject matter it regulates, the legislative and administrative concerns prompting the regulation – all point to one meaning – that the presumption can be invoked by establishing a single positive x-ray, pulmonary function test, blood gas studies, or other reasoned medical opinion.

III.

Judge Hall's opinion, in resolving the second major issue of this appeal, adheres to this court's holding in *Whicker v. United States Department of Labor Benefits Review Board,* 733 F.2d 346 (4th Cir. 1984). Both *Whicker* and *Hampton v. United States Department of Labor Benefits Review Board,* 678 F.2d 506 (4th Cir. 1982), upon which *Whicker* was primarily based, were "rebuttal" cases – that is, they decided issues arising under section 203(b). As Judge Hall correctly notes, *Whicker* held that evidence consisting of a doctor's report based solely or principally upon negative x-rays, pulmonary studies or blood gas stu-

dies, is not sufficient to rebut a presumption invoked under section 203(a)(1)-(3). Although none of the parties to this appeal, including the Director, can find much fault with the *Whicker* holding, Judge Phillips and Judge Widener single out the panel action there as the root cause of what they conceive to be confusion.

Judge Phillips notes initially in this context that his disagreement with *Whicker* is separate and apart from any deference owed to the Director's position. This distinction might well be necessary fn order to sustain Judge Phillips' reasoning. The Director's interpretation is virtually an adoption of the *Whicker* reasoning, and Judge Hall's position is essentially identical to that advocated by the Director and, for that matter, the coal mine employers who are parties to this appeal. I do not feel that we are under the *Bowles* constraint requiring deference to the position of the Director, which he advances in his appellate brief. Judge Phillips, however, does. Consequently, I do not understand how he bases the section 203(a) part of his opinion largely on the deference owed to the Director's position, yet espouses a section 203(b) position squarely contrary to the Director's briefed interpretation. It may well be that Judge Hall and Judge Phillips simply interpret the Director's *"Whicker"* interpretation in differnt ways. I find the Director's position straightforward. To guard against missing something, however, I quote extensively from the only source expressing the Director's position — his brief. It is as follows:

> THE DOCUMENTED OPINION OF A PHYSICIAN EXERCISING REASONED MEDICAL JUDGMENT, OFFERED TO REBUT A PRESUMPTION OF DISABILITY UNDER 20 C.F.R. 727.203(b), MAY BE BASED IN PART ON THE RESULTS OF TESTS THAT DO NOT QUALIFY TO INVOKE THE PRESUMPTION.

This court held in *Whicker* v. *U.S. Department of Labor, supra,* 733 F.2d 346 (4th Cir. 1984), that a party attempting to rebut the interim presumption by showing that the miner is not in fact disabled under 20 C.F.R. 727.203 (b)(1), (2) or that the miner's disability was not caused, even in part, by coal mine employment under 20 C.F.R. 727.203(b)(3), (4) may utilize test results that do not qualify to invoke the presumption as long as these results are not used "as the principal or exclusive means of rebutting [the] interim presumption." *Id.* at 349. *The Director agrees with this court that non-qualifying test results, standing alone, cannot rebut a presumption. As this court has observed, such a rule would thwart the evidentiary burdens imposed by the presumption by "effectively for[cing] the claimant to come forward with proof of pneumoconiosis by two or more accepted testing techniques before he could derive any practical benefit from the interim presumption — a burden totally incompatible with the language and purposes of the applicable regulations."* [citations omitted][13]

Although the Director thus agrees with the panel's conclusion in *Hampton, supra,* 678 F.2d at 508, that "[o]nce the presumption arises, the miner's failure to satisfy the remaining tests does not rebut [it]", the Director disagrees with *Hampton's* further holding that a doctor's opinion may not be based in part upon non-qualifying tests. *Ibid.* That further holding is incompatible with the express dicates [sic] of the statute and regulations, which mandate that all probative evidence be weighed in determining whether a presumption of disability is rebutted. Thus, Section 413(b) of the Act, 30 U.S.C. (Supp. V)

923(b), provides that "all relevant evidence shall be considered [by the fact-finder], including . . . medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests." The presumption itself further states that "all relevant medical evidence shall be considered" in rebuttal. 20 C.F.R. 727.203(b). Moreover, this express statutory and regulatory requirement accords with the applicable provisions of the APA, 5 U.S.C. 554, 556, 557, which require the fact-finder to receive relevant evidence and to consider it absent an express statutory direction to do otherwise.

In *Whicker, supra,* and in *Director, OWCP* v. *Beatrice Pocahontas Co.*, 698 F.3d [sic] 680, 682 (4th Cir. 1983), this court correctly recognized that non-qualifying test results are highly probative *when utilized in the proper context, as documentation for the opinion of a physician exercising reasoned medical judgment. Properly utilized and interpreted,* non-qualifying test results serve as critical diagnostic tools. When a physician performs a physical examination, ventilatory function and arterial blood gas tests provide significant information regarding the individual's pulmonary status; other tests, such as an electrocardiogram or a physical performance test, enable the physician to diagnose other conditions, rule out black lung disease as a source of disability, or support a reasoned opinion that the individual has no condition of any medical significance. A physician must be allowed to rely on ventilatory function and arterial blood gas test results, *in conjunction with his other findings,* in assessing whether or not an individual is disabled and if disabled, the degree and cause of the con-

dition. Thus, the ventilatory function and arterial blood gas tests, together with a chest X-ray, provide the physician with the most important and reliable information relevant to a pulmonary evaluation.

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[13]*Moreover, non-qualifying test results without more are not even probative evidence in rebuttal.* Uninterpreted ventilatory and blood gas studies, unrelated to the results of a physical examination or to a clinical history, do not indicate whether an individual is actually disabled. Similarly, a negative X-ray by itself is not probative evidence of the absence of pneumoconiosis. Thus, the Act provides that a claim cannot be denied solely on the basis of negative X-rays. 30 U.S.C. (Supp. V) 923(b). See *Usery* v. *Turner Elkhorn, supra,* 428 U.S. at 31-32.

Brief for the Director, Office of Workers' Compensation Programs at 25-28 (emphasis added) (footnotes omitted except for footnote 13). The Director concluded by stating:

> As this court recognized in *Whicker,* negative test results, *properly interpreted and utilized* in the context of a thorough medical evaluation, constitute probative evidence and must be weighed with all other probative evidence by the fact-finder.

Id. at 30 (emphasis added). Counsel for Mullins Coal Company tellingly makes essentially the same point. He states:

> What is pertinent evidence on invocation may not necessarily be pertinent on rebuttal. For example raw uninterpreted pulmonary function scores, i.e. the numbers alone, convey little rebuttal information. They may, however, indicate that a burden of proof shift is appropriate because they meet table values. The same may be true for uninterpreted blood gas scores. This is

the case with respect to pulmonary and blood gas studies because the results of these studies as a medical matter cannot, absent other medical data, tell anyone whether the miner has black lung or identify the cause of an impairment, or, for that matter detect the reason for a disability.

. . . .

The raw test scores which were relevant to invocation now have meaning only to the extent that a physician is able to attribute meaning to them. The x-rays have meaning but they cannot be conclusive. Again many other factors and physicians' views must be weighed with the x-ray. The reports will have significance on rebuttal but by placing them in the invocation portion the Secretary of Labor has simply given claimant's another basis for invocation and thus a benefit not available in Part B (20 C.F.R. § 410.490).

Supplemental Brief for Mullins Coal Co. at 24-28. Likewise, counsel for Westmoreland Coal Company and Jewell Ridge Coal Corporation stated:

> The employers acknowledge that a ventilatory study or a blood gas study is not legally sufficient to rebut the presumption based principally or exclusively upon the fact that it is nonqualifying under the interim presumption.

Supplemental Brief for Westmoreland Coal Co. and Jewell Ridge Coal Corp. at 24. They further quoted with approval from the decision of the Benefits Review Board in *Daniel v. Westmoreland Coal Co.*, 5 BLR 1-196 (1982):

> It is not the non-qualifying nature of the pulmonary function and blood gas tests which prompts the doctor's conclusion of no disability, or which the Board finds to be substantial evidence to rebut. (Indeed, in *Sykes, supra,* the Board made it clear that non-qualifying blood gas studies and/or pulmonary function studies alone would *never* be sufficient to rebut the presumption.) Rather, it is the doctor's expert medical opinion as to what the test values reveal regarding claimant's degree of respiratory impairment which may constitute substantial evidence to rebut. Such tests, as well as other medical data, provide documentation to support a reasoned medical opinion.

Id. at 26-27 (quoting *Daniel*, 5 BLR at 1-204). Counsel for Westmoreland Jewell Ridge concluded by stating:

> Under these decisions of the various Circuit Courts and the precedents of the Benefits Review Board, none of the following are sufficient to rebut the presumption in and of themselves: a ventilatory or blood gas study with reported results which is not otherwise interpreted by a physician; a physician's opinion that a coal miner is not disabled by lung disease because his performance on ventilatory or blood gas studies is better than that described in the tables of the interim presumption; or, most obviously, an opinion by a physician that the results of ventilatory or blood gas studies indicate a severe pulmonary impairment but the miner is nonetheless not disabled from his regular employment because the values are better than those set forth in the tables of the interim presumption. *Each of the described variations is insufficient for rebuttal because the evidence relates to a purely legal issues which is meaningful only for invocation, rather than to the medical issue which must be addressed for purposes of rebuttal — whether the individual re-*

tains the pulmonary capability to perform his regular coal mine work.

Id. at 27-28 (emphasis added).

Two of the same members of this court were on the three-judge panels in both *Director v. Beatrice Pocahontas Co.*, 698 F.2d 680 (4th Cir. 1983) and *Whicker.* In *Beatrice* we held that a presumption invoked on the basis of x-ray evidence was properly rebutted by medical evidence showing the claimant was able to do coal mine work. Two physicians conducted an examination of the claimant which included x-ray analysis, pulmonary function tests, and blood gas studies. These tests proved negative. In *Whicker,* the rebuttal evidence was simply a report relying principally on nonqualifying pulmonary function tests and blood gas studies. We held that evidence to be insufficient. There were no expressed disagreements to either opinion.

Perhaps, as Judge Phillips points out, the qualifying word "principally" in *Whicker,* in instances may be confusing. These litigants in this case, however, have exhibited no difficulty in understanding it or securing evidence where available to meet the *Whicker* standard. Be that as it may, I understand *Whicker* and *Beatrice* to mean the same thing as the Director indicated in his briefed position. The employer parties to this litigation have indicated a similar understanding. Likewise, I can read Judge Hall's opinion in no other way. On the other hand, I find it difficult to recognize the rationale of *Whicker* and *Beatrice* in the parade of horribles which Judge Phillips advances as the consequences of *Whicker. Hampton, Whicker,* and *Beatrice,* like most black lung opinions, are short opinions, and for that reason a number of things could be read into them. To make my position clear, however, my agreement with Judge Hall on this point is based on his clear

statement that all medical evidence can be utilized in section 203(b) defenses by a coal mine employer, including negative x-rays, pulmonary function tests and blood gas studies. They cannot, however, be used alone nor can raw test numbers have any probative effect unless they are related to the claimant's physical condition by medical documentation sufficient to show that the tests have probative validity. We cannot in one opinion solve all cases for all time. An administrative law judge must determine initially whether the evidence is sufficient in each instance. That is no more an exotic task than our obligation to review under the substantial evidence standard. It may be in given cases such as *Beatrice* that reasoned medical opinions analyzing the x-rays or raw tests results may be sufficient. Whether they are or not, however, should depend on their probative quality in shedding light on the condition of an individual claimant's respiratory system.

These are the same conclusions reached by the committees of Congress studying thousands of cases involving determination of disabilities by x-rays, pulmonary function tests, and blood gas studies. The consensus of practically all of the medical experts testifying before congressional committees was that each of these tests, if properly administered, might have some relevance, but that negative results standing alone have little or no probative value. Their findings suggested a discriminating use of all the tests, but would permit reliance on them as evidence only when each test is appropriately examined, explained and made relevant as part of an overall medical examination of a claimant. Congress understood this, the administrators of the programs understood this when they wrote the regulations, and the well-written briefs of the Director and the employers in this case demonstrate that they understand it as well.

I am authorized to say that Judge Winter, Judge Hall, and Judge Sneeden join in this opinion.

WIDENER, Circuit Judge, concurring and dissenting:

I am in the unenviable position of agreeing in part with the result Judge Hall's opinion would obtain and in part with the result which Judge Phillips would obtain. I agree with Judge Hall's opinion as to when the presumption should be invoked under sections (a)(1)-(3), but disagree with its interpretation of the rebuttal section of the regulation. I concur with the Judge Phillips construction of rebuttal section (b). It is my position that the presumption under section (a)(4) should be invoked upon a single qualifying opinion of a physician, but, absent that, the "other medical evidence" should be weighed by customary standards as Judge Phillips' opinion would decide. I concur in Part IIIB of Judge Hall's opinion concerning the award of prejudgment interest.

Sections (a)(1)-(3):

I agree with Judge Hall that sections (a)(1)-(3) mean that a single qualifying X-ray or a single qualifying set of ventilatory or blood gas studies is sufficient to trigger the presumption. I am of the belief that Judge Phillips' interpretation would make the rebuttal section of the regulation superfluous in the event there was only one kind of evidence (X-rays, blood gas, or ventilatory studies) since it would require the evaluation of that evidence by the preponderance of the evidence standard twice: first, in invoking the presumption, and, second, on rebuttal. While the preponderance of evidence standard may be the generally accepted rule for the evaluation of evidence to establish a presumption, see, e.g., 5 U.S.C. § *et seq.*, I agree with Judge Hall that the regulation as drafted supersedes this principle. See 5 U.S.C. § 559.

I am persuaded in my opinion by the Congressional purpose in enacting the 1977 Amendments so thoroughly dis-

cussed by Judge Sprouse, i.e., to make it easier for a claimant to prove a claim, but more especially by the comments of the Secretary of Labor issued in connection with the final promulgation of the very regulations at issue here. They are published in the Federal Register of August 18, 1978. Comment #2 of the Secretary, while addressing the standard on rebuttal, clearly implies that it was intended that one item of qualifying evidence would be sufficient to invoke the presumption:

> [T]he Department cannot, as has been requested by some, look for *the single item of evidence which would qualify a claimant on the basis of the interim presumption*, and ignore other previously obtained evidence. This does not mean that *the single item of evidence which establishes the presumption* is overcome by a single item of evidence which rebuts the presumption.

Notice of Final Rulemaking under the Black Lung Benefits Reform Act of 1977, 43 Fed. Reg. 36826 (1978) (emphasis added). See generally 43 Fed. Reg. 36771-36831 (Aug. 18, 1978) (Notice of Final Rulemaking); 43 Fed. Reg. 17722-17773 (April 25, 1978) Notice of Proposed Rulemaking). The Secretary's intention in promulgating the regulations is thus made clear and is contrary to the position now expressed by the Director, i.e., that the presumption is triggered only if there is a preponderance of like-kind evidence. See Judge Hall's opinion at 15-16; Judge Phillips' opinion at 44.

This interpretation is particularly acceptable to me in light of the fact that an X-ray or blood gas or ventilatory tests must meet precise standards prescribed by the regulations to qualify to invoke the presumption. See, e.g., 20 C.F.R. §§ 410-426(b); 410.428; 410.430; 718.102; 718.103; 718.105; Part 718, Appendices A, B, C; 727.206 (1985).

a case where there is a qualifying opinion from a physician and where the only evidence available is (a)(4) evidence, i.e., there are no X-rays, ventilatory studies, or blood gas studies, and all such "other medical evidence" is considered and the presumption is invoked, the very invocation has essentially made that presumption irrebuttable so far as a totally disabling respiratory or pulmonary impairment is concerned. Any available conflicting evidence will already have been considered in the presumption's invocation.

I am persuaded by the Secretary's published comments which did not come to our attention in *Sanati*[1] and have not been brought to our attention here, as well as by the reasoning above, that any conflicting evidence should not be weighed under (a)(4) until rebuttal in cases in which there is a qualifying physician's opinion, and, instead, the presumption should be weighed on the basis of one qualifying opinion which meets the regulations. In cases, however, where there is no qualifying physician's opinion but

[1]As I see this case, *Sanati* should not survive on its facts which included in the record a qualifying physician's opinion under (a)(4), which we held should not alone invoke the (a)(4) presumption, but should be weighed against other nonqualifying reports. Only its reasoning should survive as it applies to the (a)(4) presumption where there is not a qualifying opinion of a physician.

The fact that the key authority, the August 18, 1978 Federal Register, was not brought to our attention in *Sanati*, nor in this case, does little to minimize my feeling of embarrassment in not finding that authority in the *Sanati* case and announcing my withdrawal from my earlier position in *Sanati*. With Judge Boreman, the best I can do is to paraphrase Gandhi that it is better to be consistent with truth as it may present itself at a given moment than to be consistent with a previous statement I have made on a given question. See *Shiflett v. Commonwealth*, 447 F.2d 50, 62 (4th Cir. 1971) (Judge Boreman, concurring).

there is "other medical evidence" relevant to the existence or non-existence of total disability due to a respiratory or pulmonary impairment, including, for example, lung scans (see *Petry v. Califano*, 577 F.2d 860 (4th Cir. 1978)), physical examinations, medical histories, nonqualifying opinions of physicians, etc., that evidence must be weighed under customary standards to determine if it establishes the presumption under (a)(4).

Section (b):

I concur in Judge Phillips' interpretation of rebuttal section (b) and would, accordingly, overrule *Whicker* and, of course, its predecessor, *Hampton*. I am of opinion that 30 U.S.C. § 923(b), which for rebuttal is untrammeled by any restrictive interpretation or regulation and provides that "[i]n determining the validity of claims under this part, all relevant evidence shall be considered . . . ," requires consideration of all of the relevant evidence on rebuttal in determining the ultimate issue. The statutory language is so construed in subsection (b) requiring consideration on rebuttal of "all relevant medical evidence." "A more comprehensive word than 'all' cannot be found in the English language. . .," *Moore v. Va. Fire & Marine Ins. Co.*, 28 Grat. (69 Va.) 508, 510 (1877), and no reason is presented to give the word other than its ordinary meaning. I see no reason to impose artificial restrictions, as *Whicker* and *Hampton* have done, on the evidence available in finally deciding a claim.

Again, I am supported by the comments of the Secretary in issuing this regulation:

> 2. *The many comments which urge that all relevant evidence should not be considered in rebutting the interim presumption must also be re-*

jected. The Conference Report accompanying the 1977 Reform Act provides, in connection with the interim criteria, "except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the *Federal Register.*" (See also Act, section 413(b).) Moreover, the Social Security regulations, while less explicit, similarly do not limit the evidence which can be considered in rebutting the interim presumption. For these reasons, the rule is not more restrictive than the criteria applicable to a claim filed on June 30, 1973, and is otherwise fully in accordance with law.

Some of the commentators felt that the "all relevant evidence" rule would cause claims adjudicators to ignore the presumption, and simply pick from all the evidence those items on which they wish to rely. This is certainly not authorized by the interim presumption. However, the Department believes that use of the presumption should be clarified.

The interim presumption is, by statute, rebuttable and the Department has no authority to make it irrebuttable. *Nor does the Department have authority to exclude any relevant evidence from consideration in connection with any case,* or mandate a result which is contrary to the evidence in a case. However, *the Department cannot, as has been requested by some, look for the single item of evidence which would qualify a claimant on the basis of the interim presumption, and ignore other previously obtained evidence.* This does not mean that the single item of evidence which establishes the presumption is overcome by a single item of evidence which rebuts the presumption. The Act embodies the principle that doubt is to be resolved in favor of the claimant, and that principle plays an important role in claims determinations both under the interim presumption and otherwise.

43 Fed. Reg. 36771, 36826 (1978) (emphasis added). The only restriction on rebuttal, then, pertinent here, is expressed directly by Congress: "no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram [X-ray]." 30 U.S.C. § 923(b).

RESULTS

Gerald L. Stapleton:

The ALJ properly invoked the presumption on the basis of one positive qualifying X-ray. Therefore, the Benefits Review Board's conclusion that the ALJ "erroneously invoked the presumption . . . without weighing all of the X-ray evidence prior to invocation . . ." is incorrect. I believe that the ALJ was correct in not invoking the (a)(4) presumption on the evidence in this case because the doctor's report most favorable to the claimant does not qualify under the regulations. Dr. Paranthaman's report states in explicit terms that: "His respiratory impairment appears to be moderate." This, of course, does not meet (a)(4)'s requirement that the respiratory impairment must be "totally disabling."

The ALJ properly considered all relevant evidence on rebuttal, including negative and nonqualifying test results, and was supported by substantial evidence in his decision that the presumption was rebutted. I would affirm the denial of benefits.

Luke R. Ray:

Because Ray presented two positive qualifying ventilatory studies (although there were also nonqualifying studies), he met his initial burden of establishing the presumption which should have been invoked under (a)(2). In addition, since the claimant has one positive physician's opinion, documented within the regulation's requirements in (a)(4), concluding that he is totally disabled due to his respiratory impairment, the ALJ should also have invoked the presumption under (a)(4). The five negative or inconclusive doctor's opinions should have been considered on rebuttal as should the negative or nonqualifying test results and X-ray's.

For these reasons, Ray's case should be remanded for reconsideration in view of the presumption which was improperly not invoked under (a)(2) and (a)(4) and a proper consideration of whether in the light of all relevant evidence the presumption was rebutted.

Glenn Cornett:

I would affirm the ALJ's determination that the presumption was invoked under sections (a)(1), (2), and (3) since the claimant produced at least one positive qualifying test in each category. The ALJ should not, however, have weighed the positive test results against the negative ones in determining whether or not to invoke the presumption.

I am of the opinion that (a)(4) is not properly before us in this case and, therefore, express no opinion concerning the presumption's invocation. Neither the ALJ nor the Board discussed section (a)(4) in this case. Also, the plaintiff did not raise this section in his claim or on appeal. Therefore, I suggest we exceed our warrant in deciding this

claim on our own initiative. There is no case or controversy. United States Constitution, Article III.

I would affirm the finding that the presumption was not rebutted and the award of benefits.

For the reasons given by Judge Hall, I agree that the claim should be remanded for a calculation of interest in accordance with his opinion.

I am authorized to say that Judge Chapman and Judge Wilkinson join in this opinion.

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

No. 81-977 BLA
OWCP No. 231-44-2253

GERALD STAPLETON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and
Party-in-Interest	)	ORDER

Appeal from the Decision and Order of Victor J. Chao, Administrative Law Judge, United States Department of Labor.

H. Ronnie Montgomery, Jonesville, Virginia, for the claimant.

David A. Barnette (Jackson, Kelly, Holt & O'Farrell), Charleston, West Virginia, for the employer.

Bonnie J. Brownell (Donald S. Shire, Associate Solicitor of Labor; J. Michael O'Neill, Counsel for Black Lung Benefits), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge. CLARKE and SMITH, Administrative Law Judges.*

*Sitting as Acting Administrative Appeals Judges pursuant to 20 C.F.R. §801.202(b).

PER CURIAM:

Gerald Stapleton (hereinafter, claimant) appeals from a Decision and Order (80-BLA-6247) of Administrative Law Judge Victor J. Chao denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.*[1]

On appeal, claimant contends that the administrative law judge erred in finding rebuttal of the interim presumption pursuant to 20 C.F.R. §§727.203(b)(2) and (4). Employer responds that the administrative law judge's decision is supported by substantial evidence and should be affirmed. Employer also contends that, although the administrative law judge did not reach this issue, the evidence supports rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3).

The Director contends that the administrative law judge erred in invoking the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) without weighing all the x-ray evidence of record. The Director, however, further contends that the administrative law judge considered all x-ray evidence pursuant to 20 C.F.R. §727.203(b)(4), and, by crediting the negative x-ray evidence, made a finding of fact sufficient to preclude invocation pursuant to 20 C.F.R. §727.203(a)(1). The Director also contends that the adminstrative law judge erred in not applying the standards of *Fletcher v. Central Appalachian Coal Co.*, 1 BLR 1-980 (1978), to 20 C.F.R. §727.203(b)(2) rebuttal, and in not recognizing the principle that invocation pursuant to

[1]Although the present case was pending on appeal on January 1, 1982, the effective date of the Black Lung Benefits Amendments of 1981, it appears from the record before us that the Amendments do not affect the disposition of this case.

20 C.F.R. §727.203(a)(1) precludes rebuttal under 20 C.F.R. §727.203(b)(4).

The administrative law judge invoked the presumption pursuant to 20 C.F.R. §727.203(a)(1) based on the positive x-ray reading by Dr. Navani. He then weighed the remaining x-ray evidence on rebuttal. Based on the negative x-ray interpretations by Drs. Byers and Franke, and the medical report of Dr. Byer's diagnosing no pneumoconiosis, the administrative law judge found rebuttal of the presumption pursuant to 20 C.F.R. § 727.203(b)(4).

The Board must affirm the determinations of the administrative law judge if they are supported by substantial evidence in the record considered as a whole, are not irrational, and are in accordance with law. 33 U.S.C. §921(b)(3) as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates,* 380 U.S. 359 (1965).

The administrative law judge erroneously invoked the presumption pursuant to 20 C.F.R. §727.203(a)(1) without weighing all of the x-ray evidence prior to invocation to determine whether the evidence as a whole supported invocation. *Dees v. Peabody Coal Co.*, 5 BLR 1-117 (1982). This error is harmless, however, because the administrative law judge did consider the x-ray evidence as a whole on rebuttal, and credited the negative interpretations over the positive reading. *See Brown v. Bethlehem Steel Corp.*, 4 BLR 1-527 (1981). Substantial evidence supports his finding that the x-ray evidence does not establish the existence of pneumoconiosis. Consequently, this finding, although made on rebuttal, is sufficient to preclude invocation. We therefore reverse the finding of invocation pursuant to 20 C.F.R. §727.203(a)(1).

The administrative law judge did not invoke the pre-

sumption pursuant to Subsections 727.203(a)(2), (3), or (4), and the parties do not contend that the evidence could support invocation pursuant to any of these methods. We therefore need not consider either invocation or the parties' remaining contentions concerning rebuttal. Furthermore, substantial evidence supports the administrative law judge's conclusion that the record as a whole establishes the non-existence of pneumconiosis. This finding is sufficient to preclude entitlement under Subpart D of Part 410, 20 C.F.R. *See* 20 C.F.R. § 727.203(d); *Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981). We therefore need not remand this case for further consideration of entitlement to benefits. *See Sanson v. Director,* 3 BLR 1-422 (1981).

Accordingly, the administrative law judge's Decision and Order is hereby affimed.

SO ORDERED.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/ David A. Clarke, Jr.
DAVID A. CLARKE, JR.
Administrative Law Judge

/s/ Roy F. Smith
ROY F. SMITH
Administrative Law Judge

Dated this 28th
day of October 1983

FILED AS PART
OF THE RECORD
OCT 28 1983
/s/ Agnes Kurtz
Clerk
Benefits Review Board

U.S. Department of Labor
Office of Administrative Law Judges
1111 20th St., N.W.
Washington, D.C. 20036

In the Matter of	
	DATE ISSUED: APR 14 1981
GERALD STAPLETON, Claimant,	
	Case No. 80-BLA-6247
vs.	
	OWCP No. 231-44-225?
WESTMORELAND COAL COMPANY Employer,	
and	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Party In Interest	

H. Ronnie Montgomery, Esq.,
For the Claimant

David A. Barnette, Esq.
For the Employer

Before: VICTOR J. CHAO
Administrative Law Judge

DECISION AND ORDER-BENEFITS DENIED

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901 *et seq.* In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges for a formal hearing by the Director, Office of Workers' Compensation Programs on June 26, 1980.

A hearing was held before me on November 6, 1980. Both the Claimant and the Employer were represented by counsel. There was no appearance by Director.

Issues

The controverted issues are whether the miner had pneumoconiosis which arose from coal mine employment, whether he was totally disabled thereby, whether the Claimant has five dependents for purposes of augmentation, and whether the named Employer is the responsible operator.

Statement of the Case

Claimant was born June 16, 1937 and completed the second grade. He and his wife married on January 27, 1962, and they have four children, Jeffrey, who was born June 12, 1962, Stella, who was born March 9, 1965, Brian, who was born April 10, 1966 and Charles, who was born June 25, 1969. (Dir. Exh. 1) All of his children including the eldest are still in school. (Tr. 22) On his application, Claimant wrote that he stopped work on June 23, 1972 because he was short of breath, had chest pains, and felt like he was smothering. (Dir. Exh. 1) The medical evidence indicates that he stopped work because his doctor told him that he had heart problems. (Dir. Exh. 13, 15, 17).

Claimant has no special skill or training. He began working in the coal mines when he was seventeen for a small private operator named Glenn Russell. He worked around the tipple area. (Tr. 23-24) After a year, Claimant then worked for the MacWallen Coal Company for about one or two years as a laborer on a strip job cleaning coal. (Tr. 25; Dir. Exh. 2) He then worked for the June Poteet Coal Company as an underground laborer loading coal. The length of employment is unclear since one exhibit indicated

he worked for one year but the testimony indicates he worked for two to three years. (Dir. Exh. 2; Tr. 26) According to company records, Claimant worked for the Lee Coal Company in 1959 and other years, but the precise length of time is unknown because the records were lost in a flood. (Dir. Ex. 3). He worked for Wright's Mining Company from November 1961 until March 1967 in the underground mining operation; for T and T Darby Coal Company Inc. from January 9, 1968 until March 20, 1968 as a timberman; for Dean Jones Coal Company Inc. from April 4, 1968 until December 7, 1970 as a timberman; he worked for Employer, the Westmoreland Coal Company, from May 16, 1969 until December 10, 1969 and from December 11, 1970 until June 22, 1972. (Dir. Exh. 4-7; Tr. 26-30) Claimant testified that he also loaded coal underground, ran a shuttle car underground, and set up timbers and jacks underground. He figured that he worked a total of about 15 to 16 years in coal mine employment. (Tr. 24-30, 53).

Claimant testified that he stopped working because his breathing got so bad and because he has heart trouble. At night time he felt like he was smothering, and from 1972 onward he had productive cough. (Tr. 32-33) The testimony and medical history also reveals that Claimant quit smoking about eleven years ago. He had smoked about two packs a day for twenty-five years. (Tr. 35, 50)

In 1974 Claimant successfully applied for Social Security Benefits because of his heart problem and back problem. (Tr. 51)

Medical Evidence

X-rays

There were only two x-rays apart from medical reports. The November 30, 1976 x-ray read by Dr. Shiv Navani, a B reader, indicated an increase in small nodular and linear densities consistent with pneumoconiosis t 1/0 and q 1/0. (Dir. Exh. 18) Another x-ray, dated January 21, 1980 and read on July 24, 1980 by Dr. Paul Francke, a B reader, indicated no x-ray evidence of pneumoconiosis. This report was apparently a rereading of the x-ray contained in Dr. Byers' report, discussed *infra*. (Em. Exh. 2)

Ventilatory tests

There was only one pulmonary function test apart from the medical reports. It was conducted by Dr. Paranthaman on November 29, 1976. Claimant's height was 74½ inches and on the sheet containing the test results his cooperation was noted as "fair." However in his comments, the doctor wrote "mild to moderate obstructive ventilatory abnormality. Reduction in FVC and MVV may be related to restrictive lung disease, *poor effort or motivation*, respiratory muscle weakness . . ." His results were FEV, 2.12 (49% of normal) and MVV 58.5 (32% of normal). Although these results are below those contained in the regulations at 20 C.F.R. §727.203(a)(2) I am discrediting this test since Dr. Paranthaman indicated that the results may be due to poor effort or motivation, and this test therefore does not comply with 20 C.F.R. §410.430. (Dir. Exh. 12)

Blood gas tests

There was one blood gas study apart from medical reports. The test was conducted on November 29, 1976 by Dr. S.K. Paranthaman. The results were pCO_2 34.4 and pO_2 84.2 which is above the regulations at 20 C.F.R. §727.203(a)(3). The doctor noted that Claimant had chronic hyperventilation with low normal pO_2. (Dir. Exh. 14).

Medical Reports

The earliest report is by Dr. Anthony Leger and was dated January 31, 1973. This report and the accompanying tests were combined with other tests and reports of different dates so it is difficult to tell which test belongs with which report. However, it seems that this first report was based upon a history, physical, blood test, urine test, and x-ray since the blood and urine tests and the x-ray were all dated January 31, 1973. The x-ray, read by Dr. Paul O. Wells, indicated that the lungs were clear except for minimal pneumonitis. Dr. Leger writes that the patient's illness dates to June 1972 when he had chest pains and a heart murmur. He notes that Claimant complained of shortness of breath especially on exertion, and that he was told he should stop working in the mines because of his heart. Dr. Leger noted that there was no clubbing, cyanosis or dypsnea, and that the chest was clear to percussion. He concludes that Claimant has a history of tachycardia which is hard to explain. He added that if the heart rate could be controlled, there was no reason Claimant could not return to the mines. (Dr. Exh. 13)

A September 17, 1973 report by Dr. Leger indicates that Claimant's chest was clear and that he had a rapid heart rate. This opinion apparently was based upon a physical and x-rays. (Dir. Exh. 13)

A report and hospital records dated from January 17, 1974 to February 13, 1974, also by Dr. Leger, apparently was based upon a physical and EKG. The patient had a tachycardia, but an examination on January 16, 1974 revealed that the lungs were clear. Dr. Leger comments that the patient is developing a cardiac neurosis. (Dir. Exh. 13)

A June 23, 1973 letter by Dr. Daniel Gabriel who is Claimant's family physician, indicates that Claimant's chief

complaint is his heart condition. He also writes "At my insistence he quit working because of his heart condition." (Dir. Exh. 15; Tr. 42-43)

A January 21, 1974 report by Dr. David Cox was apparently based on a physical and concerns Claimant's back injury. (Dir. Exh. 16)

An August 28, 1974 report by Dr. Pierce Nelson, an expert in neuropsychiatry, was based upon a history and physical. After noting Claimant's nervous spells and periodic feelings of smothering, he concludes that the patient has an anxiety neurosis, is "basically inadequate and mildly mentally defective." (Dir. Exh. 17)

A December 27, 1976 report by Dr. Paranthaman was based upon a history, physical, blood gas test, vent test, EKG and x-ray. He notes that Claimant smoked two packs a day for 25 years, and he quit working because of heart trouble, back pain and shortness of breath. The Claimant complained of a productive cough and chest pain. He was not dyspneic at rest, and neither was there clubbing nor cyanosis. During the vent test the patient had an episode of tachycardia. The x-ray, apparently the same one read by Dr. Navani, indicated pneumoconiosis. The blood gas test showed chronic hyperventilation with low normal pO_2. Dr. Paranthaman concludes that there was evidence of pneumoconiosis and possible bronchitis. However, he added that any functional impairments appeared to be primarily from Claimant's cardiac condition and back pain. His respiratory impairments appear to be moderate. (Dir. Exh. 19)

Dr. Byers' April 1, 1980 report was based on a history, physical, lab test, blood gas test, EKG and x-ray. The doctor stated Claimant had very poor cooperation and comprehension during the vent test, which indicates the quality

standard under 20 CFR §410.430 was not met. Furthermore the results of the vent test varied widely – the highest FEV, was 3.37 and highest MVV was 137. For these reasons, I have discredited this vent test. Claimant's blood gas study's results were PCO_2 of 33.2 and PO_2 of 71 at rest, which do not qualify under 20 C.F.R. 727.203 (a)(3). Dr. Byers commented that these results indicated mild to moderate hypoxemia. The x-ray was read by Dr. Byers, a "B" reader, indicating 0/1 p which means no pneumoconiosis. See 20 CFR §410.428. The doctor however did note increased broncho-vascular markings which had apparently been read as p sizes irregular densities. The doctor concluded that there was insufficient evidence to find pneumoconiosis, and since Claimant did not seem to have respiratory disease, he attributed Claimant's dyspnea to heart problems. He also attributed Claimant's hypoxemia to his rapid heart rate and valve prolaps. (Dir. Exh. 30).

The last report, dated June 30, 1980 was by Dr. George Kress. It was based upon reviewing the reports and tests submitted, into evidence. Much of his report summarizes other doctors' findings. He concludes that there was insufficient objective evidence to justify a finding of pneumoconiosis. He says that the November 1976 blood gas study was normal. Dr. Kress, a pulmonary specialist, certainly is qualified to determine whether or not a blood gas test is normal, and I, therefore, value his opinion. The April 1980 study by Dr. Byers showed mild hypoxemia, but Dr. Kress felt that this was due to Claimant's cardiac problems because a person with a consistent tachycardia would have decreased cardiac efficiency which would most certainly cause hypoxemia. Claimant's tachycardia and mitral valve prolapse would explain his shortness of breath. He concluded that any disability was unrelated to

pneumoconiosis or coal mine employment. Since Dr. Kress never examined the Claimant nor conducted his own independent test, I give his conclusions less weight than the weight I would give an examining physician's conclusions. (Em. Exh. 1)

Discussion and Conclusions of Law

Claimant has more than 10 years of coal mine employment. He also has a positive x-ray read by Dr. Navani, a B reader. He therefore has invoked the presumption that he is totally disabled due to pneumoconiosis which arose out of coal mine employment under 20 C.F.R. §727.203(a). I shall now turn to the rebuttals under Subsection (b).

Subsection (b)(1) is not available since Claimant is unemployed. Under subsection (b)(4), Employer will prevail if Claimant does not have pneumoconiosis. Of the several x-rays in evidence, only Dr. Navani's November 30, 1976 x-ray was positive for pneumoconiosis. The x-ray read on January 31, 1973 by Dr. Wells and which was part of Dr. Leger's report indicated that other than pneumonitis, the lung fields were clear. Against this I must weigh the more recent x-ray report of Dr. John Byers, also a B reader, in which he found that there was essentially no evidence of pneumoconiosis. He added in his report that there were increased bronchovascular markings which apparently had been read as p size irregular densities, therefore explaining why he and Dr. Navani disagreed. This x-ray was reread by another B reader, Dr. Paul Francke, and he found that there were no evidence of pneumoconiosis. Under *Ansel v. Weinberger*, 529 F.2d 304 (6th Cir. 1976), a negative x-ray alone, unaccompanied by medical opinion, cannot be used to deny a claim. However, Dr. Byer's x-ray was accompanied by a very thor-

ough report. Since pneumoconiosis is a progresive disease, later medical evidence is more significant than early evidence. *Travis v. Peabody Coal Co.*, 7 BRBS 167, BRB NO. 76-117 (Dec. 27, 1977). Applying this principle, I find that the x-ray evidence merits the finding that Claimant does not have pneumoconiosis. Employer therefore prevails under subsection (b)(4).

Under 20 CFR §727.202 pneumoconiosis is defined as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. For the purpose of this definition, I note, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment *significant* [sic] *related to, or aggravated by,* dust exposure in coal mine employment (emphasis added). Based on the evidence in this case, I conclude Claimant has no pneumoconiosis within the above definition.

Under subsection (b)(2), the presumption can be rebutted if the Claimant is able to do his usual coal mine work or comparable and gainful work. In *Sturnick v. Consolidated Coal Co.*, No. 79-512 BLA, (July 14, 1980) the Benefits Review Board held that if the claimant has the benefit of the interim presumption, the burden is entirely on the Employer to show the Claimant is able to do his usual coal mine work or comparable and gainful work. In *Sykes v. Itmann Coal Co.*, No. 79-396 BLA, (Oct. 31, 1980) the Board further held the Employer can meet this burden by using medical evidence to show Claimant has no pulmonary or respiratory disability. This may be accomplished by introducing medical opinions of no disability based upon non-qualifying blood gas test or ventilatory test.

There are two vent tests in this case, the results of which have been disregarded because of claimant's poor cooperation. I note in the test on January 21, 1980 by Dr. Byers, the highest FEV_1 was 3.37 and highest MVV was 137. Even though poor cooperation was noted by Dr. Byers, the FEV_1 of 3.37 and MVV of 137 clearly do not qualify under 20 CFR §727.203(a)(2) for a claimant who is over 73".

There are two blood gas studies, none of which qualified under 20 CFR §727.203(a)(3). In the earlier test in January 1976, Dr. Paranthaman diagnosed chronic hyperventilation with low normal PO_2. In Dr. Kress' more recent report, he indicated these results were normal. The second test indicated mild to moderate hypoxemia but both Dr. Byers and Dr. Kress stated this was due to Claimant's heart problem, and not to any respiratory or pulmonary impairment. I note that none of the medical reports state Claimant is totally disabled due to a respiratory or pulmonary impairment. Dr. Byers conducted a very thorough and recent examination of Claimant and concluded there was insufficient evidence of disability due to pneumoconiosis. The same can be said for Dr. Leger's report. Dr. Paranthaman's December 27, 1976 report, which is the most favorable to Claimant states that although there is evidence of pneumoconiosis, his functional impairment was primarily from his cardiac condition and back pain. Any respiratory impairment was moderate. Dr. Paranthaman's opinion that Claimant had pneumoconiosis was largely based on Dr. Narvani's x-ray reading, which I have discredited in favor of Dr. Byer's more recent x-ray readings. For all these reasons I conclude that the Employer has shown that Claimant is not totally disabled. Further, the Benefits Review Board has held that greater weight should be given to blood gas test results than vent test results since the former involved more objective

measures. *Rowlett v. Director, OWCP,* 7 BRBS 581, BRB No., 76-482 BLA (Jan. 31, 1978). One blood gas test in this case was considered normal by Dr. Kress, and the ones indicating any disability do not indicate pulmonary or respiratory disability.

I reviewed the other Sections of 20 C.F.R. §727, and they are unhelpful to Claimant. I will now examine the regulations at 20 C.F.R. §410. Section 410.410(a) states that benefits are provided to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. Subsection (b) states that to be entitled to benefits, a claimant must show that he or she is a miner and is totally disabled due to pneumoconiosis. I have already found that the x-ray evidence merited the conclusion that Claimant did not have pneumoconiosis. Turning to the presumptions contained at §410.414, I note that none of them are helpful to Claimant since there was no biopsy or (obviously) autopsy in this case and since the x-ray evidence showed that Claimant did not have pneumoconiosis. Neither was there any other evidence which demonstrated the existence of a totally disabling chronic respiratory or pulmonary impairment. I have examined the other sections contained in 20 C.F.R. §410 and conclude that Claimant is not entitled to benefits.

I have also examined §411(c) of the Act and the regulations found that [sic] 20 C.F.R. § 718. For the reasons discussed above, benefits must be denied.

In light of the outcome of this case, it is unnecessary for me to discuss the issues concerning the number of Claimant's dependents and the question of whether or not the Employer was the responsible operator.

ORDER

The claim for Black Lung Benefits is denied.

No attorney's fees are awarded. The award of attorney's fees is permitted only in cases where the claimant is found to be entitled to benefits. *Director v. Hemingway,* 1 BRBS 73, BRB No. 74-129 (Aug. 6, 1974). Further, no petition for fees was submitted.

/s/ Victor J. Chao
VICTOR J. CHAO
Administrative Law Judge

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 81-513 BLA
OWCP No. 226-50-2786

LUKE R. RAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JEWELL RIDGE COAL CORPORATION	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
	)	
Party-in-Interest	)	

Appeal from the Decision and Order of David A. Clarke, Jr., Administrative Law Judge, United States Department of Labor.

W. Hobart Robinson, Abingdon, Virginia, for the claimant.

Elizabeth S. Woodruff (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for the employer.

Roscoe C. Bryant, III (Donald S. Shire, Associate Solicitor of Labor; J. Michael O'Neill, Counsel for Black Lung Benefits), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge. SMITH, Administrative Law Judge.*

*Sitting as Acting Administrative Appeals Judge pursuant to 20 C.F.R. §801.202(b).

PER CURIAM:

This is an appeal by the claimant from the Decision and Order (80-BLA-1185) of Administrative Law Judge David A. Clarke, Jr., denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.*[1]

In his decision, the administrative law judge first determined that claimant had established 16 years of coal mine employment and was thus eligible for the 20 C.F.R. §727.203(a) interim presumption. Upon weighing the evidence of record relevant to each subsection of the regulation, Sections 727.203(a)(1)-(a)(4), the administrative law judge concluded that claimant had failed to invoke the presumption by any of the methods contained therein. Accordingly, benefits were denied.

On appeal, the claimant contends that the administrative law judge's finding that the interim presumption was not invoked is not supported by substantial evidence or in accordance with the law. The claimant makes a number of specific contentions concerning the administrative law judge's findings under subsections (a)(1), (a)(2) and (a)(4) of the regulation.

The Board's role in reviewing the administrative law judge's decision is defined by statute. If his findings of fact are supported by substantial evidence, are rational, and his conclusions are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a). *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1]In an Order dated September 2, 1983, the Board determined that this case is not affected by the Black Lung Benefits Amendments of 1981.

Concerning invocation pursuant to Section 727.203 (a)(1), claimant asserts that: the presumption must be invoked on the basis of one positive x-ray interpretation; the administrative law judge arbitrarily excluded the x-ray interpretation of Dr. Kelly and further failed to note that Dr. Kelly was a B Reader; and the administrative law judge erred by failing to consider the x-ray interpretation of Dr. Eryilmaz.

Claimant's contention that subsection (a)(1) must be invoked where the record contains a single positive x-ray has previously been considered and rejected. *See Bozick v. Consolidation Coal Co.*, 5 BLR 1-574 (1983). With respect to the x-ray interpretation of Dr. Kelly, we initially note that the record does not contain any evidence capable of establishing the physician's status as a B reader. Inasmuch as Dr. Kelly's qualifications are not found in the record, we hold that the administrative law judge did not err in failing to note that Dr. Kelly was a B reader. *See Free v. Director,* BLR , BRB No. 80-861 BLA (October 6, 1983). Moreover, the administrative law judge did not exclude Dr. Kelly's x-ray interpretation. Rather, he fully considered this x-ray, but chose to rely on the more recent negative x-ray evidence of record and to accord greater weight to the negative interpretations of B readers. We conclude that the administrative law judge's consideration of Dr. Kelly's x-ray interpretation is rational and in accordance with law. *See Brown v. Bethlehem Steel Corp.*, 4 BLR 1-527 (1982); *Cominsky v. Director,* 3 BLR 1-557 (1981).

Claimant further contends that the administrative law judge erred by failing to consider the positive x-ray interpretation of Dr. Eryilmaz. A reading of the administrative law judge's decision reveals that he did not consider this

x-ray interpretation. However, in the instant case the administrative law judge did completely and accurately list the remaining x-ray evidence which he considered in rendering his decision. *See* Decision at 4. The administrative law judge relied on the seven negative x-rays, three of which were read by B readers, rather than one positive x-ray and an x-ray interpreted as "suspicious for early pneumoconiosis." On the basis of this rationale, we hold that his finding that subsection (a)(1) was not invoked is supported by the overwhelmingly negative x-ray evidence, despite his failure to consider the interpretation of Dr. Eryilmaz. *See generally Honaker v. Habco Coal Co.,* BLR , BRB No. 80-1423 BLA (June 10, 1983); *Cordery v. North American Coal Corp.*, 4 BLR 1-16 (1981). This finding is, therefore, affirmed.

Claimant next contends that the presumption should have been invoked pursuant to Section 727.203(a)(2) on the basis of two pulmonary function studies which produced qualifying results. In finding that the presumption had not been invoked pursuant to subsection (a)(2) the administrative law judge considered the results of these qualifying pulmonary function studies as well as the non-qualifying studies of record. He chose to rely on the weight of the non-qualifying pulmonary function studies, two of which represented the most recent studies of record. We hold that the administrative law judge's finding that the presumption was not invoked pursuant to subsection (a)(2) is supported by substantial evidence and in accordance with law. *See Crapp v. United States Steel Corp.,* BLR , BRB No. 81-584 BLA (October 4, 1983); *Campbell v. Consolidation Coal Co.*, 6 BLR 1-314 (1983). Accordingly, this finding is affirmed, and claimant's contention is rejected.

Finally, claimant contends that the administrative law judge erred in finding the interim presumption not invoked pursuant to Section 727.203(a)(4). Claimant specifically contends that the administrative law judge improperly discredited the opinions of Drs. Warden and Buddington, erroneously concluded that Dr. Buddington did not express an opinion regarding claimant's inability to work and failed to consider claimant's hearing testimony.

The administrative law judge recognized that Dr. Warden's opinion, that claimant suffered from a totally disabling obstructive lung impairment, was capable of invoking the presumption pursuant to subsection (a)(4). However, upon weighing Dr. Warden's opinion along with the remaining medical opinions of record,[2] the administrative law judge concluded that Dr. Warden's opinion was not persuasive. Inasmuch as the administrative law judge properly considered and weighed Dr. Warden's opinion pursuant to subsection (a)(4), we conclude that his finding that the doctor's opinion did not invoke the presumption is in accordance with the law, and it is, therefore, affirmed. *See Meadows v. Westmoreland Coal Co.*, BLR , BRB No. 81-1460 BLA (January 12, 1984).

Claimant correctly argues that the administrative law judge failed to recognize that Dr. Buddington had termed the claimant totally disabled. However, in considering Dr. Buddington's medical report, the administrative law judge discredited what he mistakenly believed to be the doctor's

[2]In the instant case, the record contains medical reports prepared by seven physicians. The opinions of five of these physicians, Drs. Claustro, Garzon, Gilmer, Hatfield and Rasmussen, tend to support a conclusion that the claimant either has no respiratory or pulmonary impairment or suffers from a minimal impairment which would not prevent him from performing his usual coal mine work.

conclusion of a "moderate pulmonary disease" because the bases on which the doctor relied for his conclusions failed to demonstrate an impairment. *See* Decision at 7.

It is clear from the administrative law judge's reasoning that he found that the documentation upon which Dr. Buddington based his opinion did not serve to support a diagnosis of even a moderate pulmonary impairment. This finding represents a proper credibility determination within the purview of the trier-of-fact and is in accordance with the law. *See Director v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *White v. Director*, BLR , BRB No. 80-1301 BLA (October 11, 1983); *Arnoni v. Director*, BLR , BRB No. 81-948 BLA (September 22, 1983); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-400 (1982). It follows, therefore, that, even had the administrative law judge correctly recognized that Dr. Buddington had found the claimant totally disabled, he would have discredited the physician's conclusion for the same reasons. Accordingly, we hold that the administrative law judge's error in interpreting Dr. Buddington's opinion is, in this case, harmless error, and we affirm his conclusion that this report cannot serve to invoke the presumption pursuant to subsection (a)(4).

Claimant's final contention that the administrative law judge failed to accord proper weight to his hearing testimony is without merit. The Board has held that a claimant's testimony regarding the extent of his disability is not the type of lay evidence permissible under subsection (a)(4). *See New v. Director*, BLR, BRB No. 80-1552 BLA (November 14, 1983); *Wilkin v. North American Coal Corp.*, 5 BLR 1-289 (1982).

Based on the foregoing, all of the contentions put forth by the claimant are rejected, and the administrative law

judge's finding that the interim presumption was not invoked is supported by substantial evidence, in accordance with law and is, therefore, afrirmed. *O'Keeffe, supra; Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797, 802 (7th Cir. 1977).

Accordingly, the administrative law judge's decision and Order denying benefits is affirmed.

SO ORDERED.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Law Judge

Dated this 22nd
day of March 1984

[NOT PUBLISHED]

FILED AS PART
OF THE RECORD
MAR 22 1984
/s/ Agnes Kurtz
Clerk
Benefits Review Board

U.S. Department of Labor
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

	:	DATE ISSUED
	:	FEB 3 1981
In the Matter of	:	
	:	
LUKE R. RAY	:	
Claimant	:	
	:	
v.	:	
	:	
JEWELL RIDGE COAL COMPANY	:	Case No. 80-BLA-1185
Employer	:	
	:	OWCP No. 226-50-2786
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS	:	
Party In Interest	:	
	:	

W. Hobart Robinson, Esq.
For the Claimant

Elizabeth S. Woodruff, Esq.
For the Employer

Before: DAVID A. CLARKE, JR.
Administrative Law Judge

DECISION AND ORDER-REJECTION OF CLAIM

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were so totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Big Stone Gap, Virginia, on May 14, 1980, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations issued thereunder, found in Title 20 Code Federal Regulations. New Parts 725 and 727 were added to Title 20 on August 18, 1978, and were published in the Federal Register on that date (43 F.R. 36772 *et seq.*). Regulations section numbers mentioned in this Decision and Order refer to sections of that Title.

During the course of the hearing, Employer's counsel objected to the admission of Director's Exhibit No. 27 on grounds that the X-ray had been destroyed by the medical center where it was kept, thereby precluding cross-examination and because it does not meet the requirements of 20 C.F.R. §718.102. I overrule the objection and receive Director's Exhibit No. 27 in evidence.

Issues

Director's Exhibit No. 47 identifies the following issues:

1. Whether the miner has pneumoconiosis as defined by the Act and the regulations.

2. Whether the miner's pneumoconiosis arose out of coal mine employment.

3. Whether the miner is totally disabled.

4. Whether the miner's disability is due to pneumoconiosis.

5. Whether statutes and regulations of the Act are constitutional.[1]

Background

Luke R. Ray, Claimant, was born on February 19, 1937. He did not attend school and cannot read and write. (T. 16, 18) He has spent the majority of his working career in the coal mines; having last worked in October 1973. (T.19) Although he states that he had breathing problems, he stopped working as a result of medical problems with his stomach. (T.22, 29)

Findings of Fact and Conclusions of Law

Coal Miner

The Claimant was a coal miner within the meaning of §402(d) of the Act and §725.202 of the regulations for 16 years ending in 1973.

Date of Filing

The Claimant filed timely claims for benefits under the Act on August 19, 1974, and October 19, 1976.

Responsible Operator

The Jewell Ridge Coal Company is the last employer for whom the Claimant worked for a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case under Subpart F of Part 725 of the regulations.

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[1] I will not make a ruling regarding the constitutionality of the Act.

Dependents

The Claimant has four dependents for purposes of augmentation of benefits under the Act, namely: His wife Stella and his children, Sandra Fayne, born September 25, 1959; Teresa Gay, born December 16, 1962; and Randy Lee, born August 31, 1970. (Dir. Exbs. 11, 12) Sandra Faye was a student from August 15, 1977 until June 1978. (Dir. Exb. 10)

Pneumoconiosis and Total Disability

Since the Claimant has 10 years of coal mine employment and his claim was filed prior to the effective date of 20 C.F.R. Part 718 establishing permanent medical criteria, he is entitled to the interim presumption described in §727.203 of the regulations that he is totally disabled due to pneumoconiosis arising from his coal mine employment if he meets any one of the criteria set forth in subsections (a)(1) through (a)(4) of that section. However, a review of the record indicates that the medical evidence does not meet the requirements set forth in the aforementioned regulation.

There was no biopsy and, of course, no autopsy evidence presented. However, the following X-ray evidence was received:

Date	Doctor	Finding	Exhibit
2/13/80	R.F. Hawkins, Jr.	suspicious for early pneumoconiosis	Emp. 1
1/27/79	Hospital Report	no pneumoconiosis	Emp. 2
1/24/79	W.W. Wolfe	no pneumoconiosis	Emp. 2
12/19/77	Hospital Report	no pneumoconiosis	Emp. 2
1/19/77	H.L. Bassham[2]	no pneumoconiosis	Dir. 24
	(Dr. R. Buddington agreed with Dr. Bassham's reading)		
1/3/77	P.S. Wheeler[2]	no pneumoconiosis	Dir. 26

12/29/75	R.H. Morgan[2]	no pneumoconiosis	Dir. 25
1/20/75	Geo. C. King	no pneumoconiosis	Dir. 28
8/12/74	illegible	pneumoconiosis 2/3 Q in all 6 zones	Dir. 27

In considering the X-ray evidence, I gave very little weight to the X-ray taken on August 12, 1974, by an unidentified doctor who diagnosed pneumoconiosis 2/3 Q in all six lung zones (Dir. Exh. 27) because pneumoconiosis is a progressive disease and if in 1974, Claimant had 2/3 stage Q pneumoconiosis in all six lung zones, it would have likely progressed over the next 5 years; yet it did not. In fact, the next seven X-rays found no evidence of pneumoconiosis. Only the most recent X-ray was read as even suspicious for pneumoconiosis. (Emp. Exb. 1) Apparently Dr. Hawkins was unsure whether the X-ray showed pneumoconiosis. I do not interpret a reading of suspicious for pneumoconiosis as a positive finding of pneumoconiosis. I give greatest weight to the seven negative X-rays, three of which were read by qualified "B" readers. (Dir. Exbs. 24, 25, 26) I conclude that the X-ray evidence does not establish that Claimant has pneumoconiosis. 20 C.F.R. §727.203(a)(1).

A number of ventilatory studies were performed by various doctors. They can be summarized as follows:

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[2]A qualified "B"reader.

Date	Doctor	Finding	Exhibit
2/13/80	F.L. Garzon	FEV_1 - 2.75 MBC - 89	Emp. 1
1/19/77	R. Buddington	FEV_1 - 3.03 MVV - 114	Dir. 19
1/3/77	L.Z. Claustro	FEV_1 - 1.51 MVV - 38	Dir. 18
1/13/76	D.L. Rasmussen	FEV_1 - 3.16 MBC - 108	Dir. 16
12/10/75	J.R. Hatfield	FEV_1 - 2.862 MVV - 80	Dir. 17
1/20/75	H.F. Warden, Jr.	FEV_1 - 1193 c.c. MBC - 58	Dir. 15

Of the six studies, only two, (Dir. Exhs. 15, 18) produced qualifying results under 20 C.F.R. §717.203(a)(2). The first of these was done on January 20, 1975. The second was performed on January 3, 1977. However, Dr. Claustro, who had the second test performed as part of a physical exmination, appears to have discounted the results, because he opined that Claimant had a normal cardiopulmonary system. (Dir. Exb. 22)

The more recent ventilatory studies performed in 1977 and 1980 do not demonstrate the presence of a chronic respiratory or pulmonary disease as defined by the aforementioned regulation. (Dir. Exb. 19; Emp. Exb. 1) These findings are supported by earlier ventilatory studies in 1976 and 1975. (Dir. Exbs. 16, 17) I conclude that the weight of evidence necessitates a finding that the ventilatory studies do not establish the presence of a chronic respiratory or pulmonary disease.

The following blood gas studies were performed:

Date	Doctor	Finding	Exhibit
2/13/80	F.L. Garzon	PO_2 - 92.7 PCO_2 - 24.1	Emp. 1
1/19/77	R. Buddington	PCO_2 - 67 PCO_2 - 34	Dir. 20
1/13/76	D.L. Rasmussen	Results not given. Doctor stated that "resting arterial oxygen tension was minimally reduced, as was the PCO_2."	Dir. 16

The blood gas studies do not demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood. 20 C.F.R. §727.203(a)(3).

Of course the interim presumption may be triggered if "[o]ther medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §727.203(a)(4).

The only doctor to express the opinion that Claimant was totallay disabled due to a pulmonary impairment was Dr. H.F. Warden, Jr., who examined Claimant on January 20, 1975. Dr. Warden diagnosed chronic obstructive lung disease which he opined was *probably* related to dust exposure in the coal mines. (Dir. Exb. 21) Clearly, the doctor was not sure that coal dust had caused or contributed to Claimant's lung impairment.

The most recent physical examination was performed by Dr. F.L. Garzon on February 13, 1980. Dr. Garzon found evidence of a pulmonary impairment in the form of chronic bronchitis related to cigarette smoking. He opined that

Claimant has a minimal disability and can return to coal mining work. (Emp. Exb. 1)

Intervening medical examinations resulted in findings of normal cardio-pulmonary functions to moderate pulmonary disease, with no expressions of disability.

Medical records obtained from Dr. Giles Gilmer, a treating physician, reflect that Claimant had a history of chronic gastritis and an anxiety neurosis. Dr. Gilmer's cover letter states that "[a]s far as his [Claimant's] pulmonary complaints are concerned, I think they are rather insignificant." (Emp. Exb. 2)

Dr. R. Buddington examined Claimant on January 19, 1977, and diagnosed a moderate pulmonary disease based upon Claimant's EKG, history, physical, ventilatory and blood gas studies. However, the EKG was interpreted as normal and the ventilatory and blood gas studies did not produce results which demonstrated a pulmonary impairment as defined by the regulations. 20 C.F.R. §27.203 (a)(2); (a)(3). In any event, Dr. Buddington expressed no view regarding Claimant's alleged inability to work. (Dir. Exb. 24)

Dr. L.Z. Claustro examined Claimant on January 3, 1977, and diagnosed a normal cardio-pulmonary system. (Dir. Exb. 23)

Dr. J.R. Hatfield examined Claimant on December 10, 1974, and diagnosed a *possible* pulmonary disease. However, Dr. Hatfield noted that the physical findings, spirometrics and chest examination were all within normal limits. The doctor's conclusion regarding the possibility of a pulmonary disease appears to be based on Claimant's history. (Dir. Exb. 22)

In light of the other medical opinions, I do not find Dr.

Warden's opinion of total disability, as a result of obstructive lung disease which is *probably* related to dust exposure, persuasive. Dr. Warden himself appears unsure that exposure to coal dust caused the diagnosed lung disease.

I conclude that Claimant suffers primarily from gastritis and an anxiety neurosis and that it is these problems which hamper or prevent him from working. He may have a possible or slight pulmonary impairment, but it is questionable and it is not disabling.

Claimant fails to meet his burden of proof under 20 C.F.R. §727.203(a). The evidence of record does not establish the existence of pneumoconiosis and the miner cannot be presumed to be totally disabled by pneumoconiosis.[3]

A claimant who fails to establish eligibility under 20 C.F.R. §727.203(a) may be able to establish eligibility under Part 718 of the regulations. 20 C.F.R. §727.203(d). The existence of pneumoconiosis may be established under 20 C.F.R. §718.202(a) by X-ray, biopsy, autopsy or by other medical findings of a physician based on objective medical evidence. Also, under §718.202(a)(3), a claimant is entitled to benefits if he qualifies for the presumptions of §§718.304, 305 and 306.

The evidence in this case does not meet the requirements of 20 C.F.R. §718.202(a) for establishing the existence of

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[3]Claimant had 16 years of coal mining experience, during which time he ran a motor and continuous miner. (T.20). It is unclear from the record whether this work was performed in underground mines. If Section 411(c) of the Act were applicable, he would not be entitled to its rebuttable presumption because, while there are negative X-rays of record, the other evidence does not demonstrate the existence of a totally disabling respiratory impairment.

pneumoconiosis. Nor is Claimant entitled to the presumption of §§718.304, 305 or 306.

The evidence of record fails to establish that Claimant has pneumoconiosis, as defined by the Act, or that he is totally disabled by pneumoconiosis.

Entitlement

The Claimant is not entitled to benefits under the Act.

Attorney's Fee

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case the Act prohibits the charging of any fee to the Claimant for representation services rendered to him in pursuit of his claim.

The Claim of Luke R. Ray for benefits under the Act is denied.

/s/ David A. Clarke, Jr.
DAVID A. CLARKE, JR.
Administrative Law Judge

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 81-1361 BLA
OWCP No. 405-12-0847

GLENN CORNETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MULLINS COAL COMPANY, INC., of VIRGINIA	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION ON
Party-in-Interest	)	RECONSIDERATION

Appeal from the Decision and Order of Melvin Warshaw, Administrative Law Judge, United States Department of Labor.

Hugh P. Cline (Cline, McAfee & Adkins), Norton, Virginia, for the claimant.

John L. Kilcullen (Kilcullen, Wilson and Kilcullen), Washington, D.C., for the employer/carrier.

Craig W. Hukill (Donald S. Shire, Associate Solicitor of Labor; J. Michel O'Neill, Counsel for Black Lung Bene-

fits), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge. CLARKE and SMITH, Administrative Law Judges.*

PER CURIAM:

Mullins Coal Company, Inc. of Virginia and its carrier, Old Republic Insurance Companies, (employer) move for reconsideration of the Board's Decision and Order affirming the award of benefits issued April 27, 1983, in the captioned case.

Employer argues that the administrative law judge failed to follow the rules of evidentiary procedure developed by the Board in determining Black Lung claims; thus, the decision below and the Board's affirmance are inconsistent with prior law and should be reconsidered. Employer additionally seeks to have Judge Kalaris clarify her position on the issue of interest, as she declined to follow her dissent in *Kuhar v. Bethlehem Mines Corp.*, 5 BLR 1-765 (1983). Neither claimant nor the Director have responded to employer's motion.

Upon reconsideration, we reaffirm our prior decision. The administrative law judge properly found the interim presumption invoked under 20 C.F.R. §727.203(a)(3). Of the three blood gas studies of record, two, including the most recent study, are both qualifying and conforming. These constitute substantial evidence in support of the adminstrative law judge's finding of invocation. Because the presumption has been invoked under one method, any error made regarding another method is harmless. *Matney v. J & L Coal Co.*, 3 BLR 1-332 (1981).

*Sitting as Acting Administrative Appeals Judges pursuant to 20 C.F.R. §801.202(b).

After weighing the evidence of record, the administrative law judge concluded that employer had not rebutted the presumption under 20 C.F.R. §§727.203(b)(2) and (b)(3). The administrative law judge chose to credit the opinion of Dr. Fleenor, claimant's treating physician, who diagnosed claimant as having pneumoconiosis and cardiovascular heart disease which were totally disabling. The administrative law judge could reasonably conclude that the evidence as a whole is not sufficient to carry employer's burden on rebuttal under Sections 727.203(b)(2) and (b)(3). Substantial evidence supports the administrative law judge's findings.

Because Judge Kalaris is no longer a member of this Board, employer's request for clarification of her position on the interest issue is moot.

Accordingly, the Board grants claimant's Motion for Reconsideration and on such reconsideration reaffirms its decision of April 27, 1983 affirming the award of benefits.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY,
Chief
Administrative Appeals Judge

Dated this 2nd day
of April 1984

/s/ David A. Clarke, Jr.
DAVID A. CLARKE, JR.
Administrative Law Judge

[NOT PUBLISHED]

RECEIVED APR 4
1984

/s/ Roy P. Smith
ROY P. SMITH
Administrative Law Judge

FILED AS PART
OF THE RECORD
APR 02 1984
/s/ Agnes Kurtz IOP
Clerk
Benefits Review Board

BENEFITS REVIEW BOARD
U.S. Department of Labor

No. 81-1361 BLA
OWCP No. 405-12-0847

GLENN CORNETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MULLINS COAL COMPANY, INC. of VIRGINIA	)	
	)	
and	)	
	)	
OLD REPUBLIC COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal from the Decision and Order of Melvin Warshaw, Administrative Law Judge, United States Department of Labor.

Hugh P. Cline (Cline, McAfee & Adkins), Norton, Virginia, for the claimant.

John L. Kilcullen (Kilcullen, Wilson and Kilcullen), Washington, D.C., for the employer.

Craig W. Hukill (T. Timothy Ryan, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; J. Michael O'Neill, Counsel for Black Lung Benefits), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER AND KALARIS, Administrative Appeals Judges.

PER CURIAM:

This is an appeal by the employer, Mullins Coal Company, Inc. of Virginia, and its carrier, Old Republic Companies, from a Decision and Order (80-BLA-5912) of Administrative Law Judge Melvin Warshaw awarding benefits pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.*[1]

After careful consideration of the arguments raised on appeal and the evidence in the record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and is in accordance with law. Accordingly, the Decision and Order is affirmed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932, and the case law summarized in *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). *See*

[1] Although the present case was pending on appeal on January 1, 1982, the effective date of the Black Lung Benefits Amendments of 1981, it appears from the record before us that the Amendments do not affect the disposition of this case.

Kicklighter v. Ceres Terminal, Inc., 13 BRBS 109 (1981), *aff'd mem.*, 665 F.2d 1040 (4th Cir. 1981).

SO ORDERED.

/s/ Robert L. Ramsey, Chief
ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/ Julius Miller
JULIUS MILLER
Administrative Appeals Judge

/s/ Ismene M. Kalaris
Administrative Appeals Judge

Dated this 27th day
of April 1983

[NOT PUBLISHED]
RECEIVED APR 29 1983

FILED AS PART
OF THE RECORD
APR 27 1983
/s/ Agnes Kurtz
Clerk
Benefits Review Board

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th St., N.W.
Washington, D.C. 20036

In the Matter of	
GLENN CORNETT, Claimant,	DATE ISSUED: 5-29-81
v.	Case No. 80-BLA-5912
MULLINS COAL COMPANY, INC. OF VA.	OWCP No. 405-12-0847
Employer,	
and	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS Party In Interest	

Hugh P. Cline, Esq.
Cline, McAfee & Atkins
Norton, Virginia 24273
For the Claimant

Derwood H. Rusher, II, Esq.
P.O. Drawer S
Grundy, Virginia 24614
For the Employer

BEFORE: MELVIN WARSHAW
Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* In accordance with the Act, and the Regulations issued there-

under, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Kingsport, Tennessee, on January 28, 1981, at which all parties had full opportunity to present evidence and argument, as provided in the Act and the Regulations issued thereunder, found in Title 20, Code of Federal Regulations.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant

Glenn Cornett (herein "Claimant") was a coal miner within the meaning of §402(d) of the Act and §725.202 of the regulations for approximately 36 years ending in 1978. Claimant was fifty-nine years old at the time of the hearing. He worked mainly inside the mine as a repairman performing electrical tasks and also operated an automatic machine that cut and loaded coal. His coal mine employment continuously exposed him to coal mine dust.

[1]The Director did not appear. Instead, he relied upon the 24 exhibits that were transmitted by the Deputy Commissioner and admitted into evidence by me pursuant to § 725.421 the Regulations.

In 1977 Claimant was hospitalized with a heart attack. His treating physician, Dr. L.J. Fleenor, informed him at that time that he also was suffering from black lung disease. After a period of recuperation, Claimant returned to the mine but found he couldn't walk far without experiencing shortness of breath. Claimant was also coughing up a grayish-looking sputum. In less than a year, he completely ceased work at the coal mine although he continued to perform sedentary work at his family's hardware store.

Date of Filing

The Claimant timely filed his claim for benefits under the Act on July 14, 1978.

Responsible Operator

The Mullins Coal Co., Inc. of Virginia (herein "Employer") is the last employer for whom the Claimant worked for at least a one-year cumulative period and is the properly designated responsible coal mine operator in this case under Subpart F.

Dependents

The Claimant has one dependent for purposes of augmentation of benefits under the Act, his wife Juanita Cornett.

Pneumoconiosis and Total Disability

Since the Claimant has more than 10 years of coal mine employment and his claim was filed prior to the effective date of 20 C.F.R. Part 718 establishing permanent medical criteria, he is entitled to the interim presumption described in §727.203 of the regulations that he is totally disabled due to pneumoconiosis arising from his coal mine employment

if he meets any one of the criteria set forth in the subsections (a)(1) through (a)(4) of that section.

Subsection 203(a)(1) provides that a chest x-ray may invoke the interim presumption if it establishes the presence of pneumoconiosis. Five x-ray film interpretations have been submitted. A February 13, 1979 film was taken by Dr. M.R. Ramakrishnan at the request of Dr. Fleenor, Claimant's treating physician. Dr. Ramakrishnan interpeted the film as showing occasional small round opacities in the right upper lung field which would fit the profusion category of 0/1. The same film was interpreted by Dr. Fleenor as showing category P 1/0 pneumoconiosis. At the hearing, the Employer submitted evidence of a March 31, 1977 film by Dr. S. Navani which was performed on portable x-ray equipment. Dr. Navani stated that the lungs are well expanded and that no gross abnormality is demonstrated. Finally, Dr. William Evans took an x-ray film on January 8, 1980 which he reported as being essentially normal for this size individual.[2]

While it is true that the x-ray reading of Category 1 submitted by Dr. Fleenor shows a degree of nodule profusion sufficient to invoke the presumption, it should be weighed against all the x-ray interpretations.

Neither Dr. Navani nor Dr. Evans, specifically found an absence of pneumoconiosis or indicated that they examined the x-rays for this purpose. Accordingly, I credit their interpretations with far less weight than I would if they had used the classification system devised to classify the profusion of

[2]The fifth interpretation was sumitted by Dr. Greene at the request of the Department of Labor. However, because of the recent ruling in *Tobias v. Republic Steel, Inc.* ____ BRBS ____, BRB No. 80-1114 BLA (February 6, 1981) which found such rereadings to be in contravention of Section 413 of the Act, I have not considered the rereading by Dr. Greene.

opacities or had otherwise specified that the x-rays were examined to determine whether they showed any evidence of pneumoconiosis.

Moreover, the remaining x-ray interpretation by Dr. Ramakrishnan was not totally negative for pneumoconiosis but rated the film category 0/1. Accepting the general principle that doubts should be resolved in favor of the Claimant, I find that Dr. Fleenor's interpretation is sufficient to invoke the interim presumption of total disability pursuant to §727.203(a)(1).

Further, I also find that the Claimant has invoked the interim presumption by submitting a ventilatory study which establishes the presence of a chronic respiratory or pulmonary disease pursuant to §727.203(a)(2). A pulmonary function test performed on March 21, 1979 by Dr. Fleenor produced an FEV1 of 1.8 and an MVV of 57. The qualifying values for Claimant's height are an FEV1 of 2.4 and an MVV of 196. Dr. Fleenor submitted the requisite tracings and commented that the test showed moderately severe chronic obstructive lung disease. A second test submitted by Dr. R.A. Abernathy performed on August 1, 1980 produced an FEV1 of 2.58 and an MVV of 54.[3] Because the FEV1 value is only slightly above the maximum value for

[3]The Employer submitted a letter from Dr. F.L. Garzon who studied a pulmonary function test and determined that only one FVC and one MVV were done. Dr. Garzon advised that it is necessary to do several tests to be certain of the consistency of effort. However, Dr. Garzon does not identify the date of the test, nor does he specify the values obtained. At the hearing, the employer stated that Dr. Garzon was referring to Dr. Abernathy's test submitted in this matter. Yet, the tracings submitted with that test appear to provide more than one FEV_1 and more than one MVV. Accordingly, without further specific information as to why Dr. Abernathy's test is unreliable, I can credit Dr. Garzon's opinion with very little weight.

purposes of invoking the presumption, I find that this non-qualifying test does not outweigh or rebut the March 21, 1979 test submitted by Dr. Fleenor.

Dr. Abernathy's report of January 8, 1980 contained a blood-gas test which produced a PC02 value of 34 and a PO2 value of 66. These values establish the presence of an impairment in the transfer of oxygen that entitles the Claimant to the interim presumption pursuant to §727.203 (a)(3). Dr. S.K. Paranthanan performed a blood gas test on March 31, 1979 which produced values at rest of a PaO2 of 67.6 and a PaCO2 of 33.2. The same test was performed with mild exercise and the PaO2 increased to 91.4 but the PaCO2 decreased to 31.1. Since the Regulations do not specify that the values of the post-exercise test should be given greater weight than the pre-exercise test, equal weight may be given to blood gas tests taken at rest and taken with exercise. *Sturnick v. Consolidation Coal Company,* 12 BRBS 634, BRB No. 79-512 BLA (July 14, 1980). I have weighed the three blood-gas tests and find the qualifying test performed by Dr. Abernathy persuasive evidence. The pre-exercise test submitted by Dr. Parantharnan only marginally exceeds the qualifying values and therefore supports rather than rebuts a finding of disability.

The Claimant has invoked the presumption pursuant to §§727.203(a)(1), (2) and (3). Accordingly, further consideration of this case will focus on the rebuttal provisions of §727.203(b). Testimonial evidence established that the Claimant is not performing his usual coal mine employment, but that he is performing as a sedentary part-time worker in a family-owned hardware store. A §727.203(b)(1) rebuttal, i.e., Claimant is working comparable employment, must establish that the level of physical exertion required by Claimant's present employment is similar to the

levels of exertion required in his former coal mine employment. *Catter v. Director* 8 BRBS 979, BRB No. 77-768 BLA (July 20, 1978). The Claimant credibly testified that his employment is not at all comparable with his former coal mine employment in terms of physical exertion and no contradictory evidence was submitted. I therefore find that the evidence establishes that Claimant is not performing comparable and gainful work.

A §727.203(b)(2) rebuttal, i.e., Claimant is capable of performing his usual or comparable coal mine work, may be established by showing the absence of a pulmonary impairment. *Sykes v. Itmann Coal Co.,* ____ BRBS ____, BRB No. 79-396 BLA and 79-396 BLA-A (October 31, 1980). However, the medical evidence consisting of Claimant's ventilatory studies, blood-gas tests, and Dr. Abernathy's opinion that the Claimant is substantially precluded from doing any work beyond what he appears to be doing at the hardware store overwhelmingly establishes a respiratory impairment that causes Claimant to be incapable of performing his usual or comparable work. Further, Claimant credibly testified that he could no longer perform such arduous labor. A Claimant's testimony, when judged credible, is probative evidence to establish the level of exertion required by his former coal mine work and his current capabilities. *Neal v. Clinchfield Coal Co.,* 7 BRBS 549, BRB No. BLA (January 27, 1978). Accordingly, I find that Claimant's presumptive total disability is not rebutted by a showing that he is performing sedentary work that is not in no respect comparable with his former coal mine employment.

The remaining rebuttal provision is to establish that Claimant's respiratory impairment which causes total disability is not due in whole or in part to pneumoconiosis.

Such a conclusion may be reached notwithstanding the finding of pneumoconiosis. An x-ray may establish pneumoconiosis, but it does not necessarily reflect the extent of disability of the lungs. *Perkins v. Ryans Creek Coal Co.*, ____ BRBS ____, 2 Black Lung Reporter 1-214, BRB No. 77-324 BLA (February 28, 1979). Such a determination can be made by weighing the medical reports.

In a report dated February 13, 1979, Dr. Fleenor diagnosed black lung disease and hypertensive arteriosclerotic vascular disease. He advised that the Claimant cannot walk long distances on level ground without experiencing dyspnea on exertion and that he is limited to lifting a maximum of 20 lbs.

In his report dated January 9, 1980, Dr. Abernathy listed his medical impressions as (1) arterial sclerotic heart disease, (2) hypertensive cardiovascular disease, (3) diabetes mellitus, (4) arteriosclerosis obliterans, (5) chronic bronchitis, and (6) early obstructive pulmonary disease. Dr. Abernathy stated that the Claimant's major problems appear to be related chiefly to hypertension and heart disease. He added that he also has generalized atherosclerosis. However, Dr. Abernathy also noted that the ventilatory studies revealed an obstructive component to ventilatory airflow particularly in the small airways and some pulmonary impairment as revealed by the qualifying values from the blood-gas test. In a supplemental opinion dated August 1, 1980, Dr. Abernathy stated that as far as Claimant's respiratory system is concerned, he is able to return to work. He added that Claimant's breathing problem appears to be related to his hypertension and his cardiovascular system. Further, he contends that the pulmonary bronchitis is caused by cigarette smoking and that it does not appear that exposure to coal mining dust has produced Claimant's disability.

In order to establish that Claimant's pulmonary impairment is caused by smoking and not by pneumoconiosis, the Employer must show (1) whether it is possible to distinguish to any degree of medical certainty between pulmonary disability caused by smoking or by exposure to coal dust; (2) facts in the record which support such a distinction; (3) a medical expert's stated opinion as to the origin of pulmonary disability and (4) a medical expert's explanation of how the evidence in the record supports his conclusion. *Mendis v. Director,* 10 BRBS 122, BRB No. 77-132 BLA (March 30, 1979); *Blevins v. Peabody Coal Co.,* 9 BRBS 510, BRB no. 78-406 BLA (December 29, 1978). I find that the evidence of record, including Dr. Abernathy's report, is insufficient to meet this test.

Moreover, Dr. Abernathy's opinion that Claimant's breathing problem appears to be caused by impairments unrelated to coal mine employment must be considered in light of the x-ray which establishes pneumoconiosis sufficient to invoke the presumption of total disability and the other objective tests cited herein; Dr. Fleenor's medical opinion; and the Claimant's 36 years of coal mine employment. I do not find that the evidence meets the criteria set out in *Blevins* and *Mendis.*

Dr. Fleenor also diagnosed cardiovascular disease in addition to category 1 pneumoconiosis and he attributed Claimant's disability to both impairments. Testimonial evidence has established that Dr. Fleenor is Claimant's treating physician. Further, there is no indication that Dr. Abernathy has examined the Claimant more than once. Therefore, Dr. Fleenor's opinion may be given greater weight than that of a physician who has examined the Claimant on only one occasion. *Anton v. Eastern Gas & Fuel Corp.,* 10 BRBS 255 (1979).

Accordingly, I find that the totality of evidence does not rebut the presumption of total disability and Claimant is therefore entitled to benefits under the Act commencing as of July 1, 1978.

Entitlement

The Claimant is entitled to benefits under the Act commencing as of July, 1978.

Attorney's Fee

The Claimant's attorney filed an application for approval of a fee for representation services rendered to the Claimant in the amount of $825.00. The Employer filed an objection thereto based on excessive hours spent on reviewing and analyzing the file as well as unnecesssary client conference time. I have examined the application in regard to these objections but find the fee to be fair and reasonable for the necessary work done.

ORDER

The Mullins Coal Co. Inc., of Virginia is ordered to:

1. Pay to Claimant all benefits to which Claimant is entitled under the Act, augmented by reason of Claimant's dependent described above and offset by any State or Federal compensation received for coal worker's pneumoconiosis, commencing as of July, 1978.

2. Reimburse the Secretary of Labor for any payments under the Act the Secretary of Labor has made to Claimant and to deduct such amounts, as appropriate, from the amounts the responsible operator is ordered to pay under paragraphs 1 and 2 above.

3. Pay to the Claimant or to the Secretary of Labor, as appropriate, interest at the rate of six per centum per annum from the date upon which any payment would originally have been due if payments had been made from the dates set forth above until the date upon which payment is actually made.

4. Pay to Hugh P. Cline, the sum of $825.00 for representation services to the Claimant in this matter.

/s/ Melvin Warshaw
MELVIN WARSHAW
Administrative Law Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1520

Luke R. Ray,

Petitioner

versus

Jewell Ridge Coal Corporation and Director, Office of Workers' Compensation Programs, United States Department of Labor,

Respondents

Director, Office of Workers' Compensation Programs,

Intervenor

No. 84-1528

Mullins Coal Company, Inc. of Virginia, and Old Republic Industries,

Petitioners

versus

Glenn Cornett and Director, Office of Workers' Compensation Programs, United States Department of Labor,

Respondents

ORDER

The en banc court now has before it the petition of Mullins Coal Company, Inc. of Virginia, Jewell Ridge Coal Corporation, and Old Republic Industries to rehear our en banc decision in these cases.

We are of opinion that our decision should not receive further cosideration.

It is accordingly ADJUDGED and ORDERED that the petition that we rehear our en banc decision in these cases shall be, and the same hereby is, denied.

With the concurrences of Chief Judge Winter and Judges Hall, Sprouse, Chapman, and Wilkinson. Judges Russell, Phillips, Murnaghan and Ervin dissent; they would grant the petition.

/s/ [Illegible]
For the Court

FILED
APRIL 21 1986
U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-2193

Gerald Stapleton,

Petitioner

versus

Westmoreland Coal Company
and
Director, OWCP,

Respondents/
Intervenors

ORDER

We have for consideration a petition for rehearing filed out of time and a motion to recall the mandate in this case.

It is ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, filed.

It is ADJUDGED and ORDERED that the motion to recall the mandate shall be, and it hereby is, denied.

We are of opinion the petition for rehearing is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Chief Judge Winter and Judges Russell, Hall, Phillips, Murnaghan, Sprouse, Ervin, Chapman and Wilkinson.

FILED
APR 21 1986
U.S. Court of Appeals
Fourth Circuit

/s/ [Illegible]
For the Court

SUPREME COURT OF THE UNITED STATES

No.A-1033

MULLINS COAL COMPANY, INC. OF
VIRGINIA, ET AL.,

Applicants,

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, ETC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including August 29, 1986.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 8th
day of July, 1986.

[RECEIVED JUL 9 1986]

20 C.F.R. § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in §410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than —	
	FEV_1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial CO_2	Arterial pO_2 equal to or less than (mm. Hg.)
30 or below	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40-45	60
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence

shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under part 718 of this subchapter as amended from time to time.

Commentary to 20 C.F.R. § 727.203

Comments received: The greatest amount of controversy in the comments received has been generated in connection with this section. (a) A number of comments argue that the section is far less restrictive than the standards ap-

plied by the Social Security Administration and that these standards are accordingly not authorized by the Act. Others argue that the requirement that all relevant evidence be considered is more restrictive than the Social Security standards and is contrary to law for that reason. A physician commented that the disability tables show no disability and should be eliminated. Some comments urge that the blood gas table should be raised by 5mm. Hg in the PO_2 column while others argued that it should be lowered by 5mm. Hg. There were suggestions that the interim presumption should be made available on the basis of A-aO_2 gradient standards. Other comments argue that blood gas test results are a poor measure of disability and should be eliminated. A few comments urge that the Social Security interim standards (20 CFR § 410.490) be adopted verbatim. (b) A few comments urge the Department to delete the term "documented" from paragraph (a)(4), permit lay evidence to give rise to the presumption in the case of a living miner and require that a medical report which gives rise to the presumption should be filed by a pulmonary specialist.

Discussion and changes: The Department believes that the interim presumption format provided by this section is both practicable and fully in accordance with law.

More specific responses to the comments received are as follows:

1. The Department does not agree with the view that the interim standards cannot as a matter of law be more favorable to claimants than the Social Security Administration standards. The Act requires only that the Department's standards be no more restrictive than those applied by the Social Security Administration.

2. The many comments which urge that all relevant evidence should not be considered in rebutting the interim presumption must also be rejected. The Conference Report accompanying the 1977 Reform Act provides, in connection with the interim criteria, "except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the FEDERAL REGISTER." (See also Act, section 413(b).) Moreover, the Social Security regulations, while less explicit, similarly do not limit the evidence which can be considered in rebutting the interim presumption. For these reasons, the rule is not more restrictive than the criteria applicable to a claim filed on June 30, 1973, and is otherwise fully in accordance with law.

Some of the commentators felt that the "all relevant evidence" rule would cause claims adjudicators to ignore the presumption, and simply pick from all the evidence those items on which they wish to rely. This is certainly not authorized by the interim presumption. However, the Department believes that use of the presumption should be clarified.

The interim presumption is, by statute, rebuttable and the Department has no authority to make it irrebuttable. Nor does the Department have authority to exclude any relevant evidence from consideration in connection with any case, or mandate a result which is contrary to the evidence in a case. However, the Department cannot, as has been requested by some, look for the single item of evidence which would qualify a claimant on the basis of the interim presumption, and ignore other previously obtained evidence. This does not mean that the single item of evidence which establishes the presumption is overcome by

a single item of evidence which rebuts the presumption. The Act embodies the principle that doubt is to be resolved in favor of the claimant, and that principle plays an important role in claims determinations both under the interim presumption and otherwise.

3. The comment that the pulmonary function tables show no disability and should be eliminated is rejected. The pulmonary function tables to be used in the application of the interim presumption were developed by the Social Security Administration. They have proved to be an effective measure of disability. These tables were the subject of Congressional inquiry, and in light of that inquiry have been mandated by the 1977 amendments.

4. The suggestions that the blood gas disability table be eliminated or raised or lowered by certain specified values are rejected. Building upon the Department's earlier experience with blood gas test results, and after consultation with knowledgeable medical authorities, it has been determined that the values embodied in the blood gas table are an accurate and useful measure of disability and are particularly useful in determining respiratory or pulmonary impairment in a person suffering from pneumoconiosis.

The Department will, however, in connection with the public hearings being held on the permanent medical criteria (20 CFR Part 718), which criteria contain an identical blood gas study table, consider comments and testimony relating to those criteria and make changes in this section if appropriate.

5. The Department cannot accept the suggestions that an A-aO_2 gradient standard be included within the interim presumption. In developing the standards contained in this section as well as the permanent criteria, the Depart-

ment has inquired into the reliability of the A-aO_2 gradient as a mesure of respiratory or pulmonary disability and impairment. The authorities contacted share the view that the A-a O_2 gradient test is often not a reliable measure of disability or impairment because it is difficult to administer and reliable, uniform standards for administering the test have not been developed and could not readily be developed. While sufficient justification has not been provided to warrant building an A-aO_2 gradient test into the interim presumption, consideration of individual A-aO_2 gradient results accompanied by a reasoned medical report may, of course, be undertaken by a claims adjudicator, and weight may be accorded these results when appropriate.

The Department will reconsider its views on the A-aO_2 gradient if testimony or evidence presented at the hearing on the permanent standards (20 CFR Part 718) so warrants.

(b)(1) Some of those who commented expressed the opinion that the word "documented" in paragraph (a)(4) is unclear and should be deleted. This paragraph extends the application of the interim presumption on the basis of a medical report alone. This could not be done with respect to a claim filed on June 30, 1973. In order to justify this extension, the Department believes it is necessary to require both a documented and reasoned report. It is not, however, intended that documentation should consist exclusively of objective medical tests. It is intended that the physician's observation of the miner, personal knowledge of the miner's condition and work history, and other similar matters would constitute documentation.

(2) Additional commentators recommeded that lay evidence should be sufficient to establish the interim presumption in the case of a living miner. Lay evidence may, of course, be considered in every claim. However, in the case of a living miner who can be examined by a physician at no cost to the miner, the Department is convinced that it would be improper to extend the applicability of the interim presumption on the basis of lay evidence alone, notwithstanding contrary medical evidence or the refusal of the miner to obtain medical evidence.

(3) Some commentators recomended that the Department require that paragraph (a)(4) reports be submitted by pulmonary specialists only. The physician who is most likely to have knowledge of the miner's work and health history necessary to prepare a paragraph (a)(4) report is the miner's family physician, who may or may not be a pulmonary specialist.

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20 C.F.R. § 410.490

§ 410.490 Interim adjudicatory rules for certain Part B Claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language

and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than –	
	FEV_1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is

able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

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5 U.S.C. § 556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exlcusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such

violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

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5 U.S.C. § 559

§ 559. Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

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30 U.S.C. § 932(a)

§ 932(a). Benefits; applicability of Longshore and Harbor Workers' Compensation Act; promulgation of regulations

Subject to section 28(h)(1) of the Longshore and Harbor Workers' Compensation Act Amendemnts of 1984, during any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927) as amended [33 U.S.C.A. § 901 et seq.], as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) [33 U.S.C.A. §§ 901, 902, 903, 904, 908, 909, 910, 912, 913, 929, 930, 931, 932, 933, 937, 938, 941, 943, 944, 945, 946, 947, 948, 948a, 949, 950], shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 9501(d) of Title 26), be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, or with respect to entitlements established in paragraph (5) of section 921(c) of this title. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the

payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

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33 U.S.C. § 919(d)

§ 919(d) Provisions governing conduct of hearing; administrative law judges

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

ORIGINAL

NO. 86-327

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY and JEWELL RIDGE COAL CORPORATION,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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48pp

The respondents, Luke R. Ray and Gerald R. Stapleton oppose granting a writ of certiorari and state that there is not a clear conflict between the Circuits and any alleged conflicts with the Administrative Procedure Act were not before the Fourth Circuit Court of Appeals and, therefore, not an appropriate issue for a Writ of Certiorari.

I. THERE IS NO CLEAR CONFLICT IN THE CIRCUITS.

The petitioners claim there is a conflict in the Circuits between Back v. Director, 796 F.2d 169, (6th Cir. 1986) and Stapleton, et al. v. Westmoreland Coal Co., et al., 785 F.2d 424 (1986) (en banc). In Back, supra, a three judge panel of the Sixth Circuit rejected the holding of Stapleton, supra., in a cursory four page opinion.

The respondents would maintain that the Fourth and Sixth Circuits are not in conflict until the Sixth Circuit gives this matter the indepth hearing and consideration given by the Fourth Circuit.

II. QUESTIONS OF VIOLATIONS OF ADMINISTRATIVE PROCEDURE ACT.

The Fourth Circuit Court of Appeals entered an order directing that Gerald Stapleton v. Westmoreland Coal Company and Director, Office of Workers' Compensation Programs, U. S. Department of Labor, Benefits Review Board and Luke R. Ray v. Jewell Ridge Coal Company and Director, Office of Workers' Compensation Programs, United States Department of Labor and Mullins Coal Company, Inc., Inc. of Virginia, and Old Republic Industries v. Glenn Cornett and Director, Office of Workers' Compensation Programs, United States Department of Labor be consolidated for the purposes of en banc hearing by the court. By that order, the court directed the parties to address the following issues:

> (1) Whether, despite the evidence of negative or non-qualifying x-rays, ventilatory studies, blood gas studies, and/or physicians' opinions, the interim presumption of pneumoconiosis under 20 C.F.R. Section 727.203(a) is automatically triggered by any one of the following:
>
> (a) one positive x-ray;
>
> (b) one set of positive ventilatory studies;
>
> (c) one set of positive blood gas studies;
>
> (d) one physician's opinion.
>
> (2) Once the interim presumption of pneumoconiosis is triggered, whether and to what extent is non-qualifying medical evidence permitted to rebut the presumption under 20 C.F.R. Section 727.203(b).

The question as to whether Stapleton, supra, violates the Administrative Procedure Act was not briefed before the Fourth Circuit nor argued and, therefore, is not appropriate as a source of appeal.

Therefore, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 86-327

In the Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether an otherwise eligible claimant for black lung benefits automatically invokes a presumption of compensable disability under 20 C.F.R. 727.203(a) by introducing a single piece of qualifying medical evidence.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-101a) are reported at 785 F.2d 424.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2a) was entered on February 26, 1986. A petition for rehearing was denied on April 21, 1986 (Pet. App. 152a-154a). The Chief Justice extended the

time for filing a petition for a writ of certiorari to August 29, 1986 (Pet. App. 155a). The petition was filed on August 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The non-federal respondents are coal miners who filed claims with the Secretary of Labor for black lung benefits. Upon completion of administrative proceedings, their cases were heard by the en banc Fourth Circuit. The court overruled several prior decisions and adopted a new interpretation of the regulations that define the proof scheme for adjudication of the claims at issue. Petitioners, who are coal mine operators and an operator's insurer, challenge the Fourth Circuit's ruling. The federal respondent agrees that the new interpretation is erroneous and that there is a significant conflict among the circuits on the question presented. Accordingly, we do not oppose the granting of the petition for a writ of certiorari.

1. Title IV of the Federal Mine Health and Safety Act of 1969, as amended in 1972, 1977, 1978, and 1981, 30 U.S.C. 901 *et seq.*, establishes a benefit program for coal miners who are totally disabled by pneumoconiosis (black lung disease) arising out of coal mine employment. See generally *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976). Benefits under Part C of the program, which is administered by the Department of Labor, are paid either by coal mine operators or by a special federal government fund, the Black Lung Disability Trust Fund.[1] *Id.* at 10. Respondent Director, Office of

[1] The Black Lung Disability Trust Fund pays benefits where a miner's last coal mine employment ended before

Workers' Compensation Programs, is responsible, by delegation of the Secretary of Labor's authority, for administering the federal fund and Part C of the black lung program. 20 C.F.R. 701.201, 701.202.

Claims for benefits under the program are adjudicated by different agencies and under different regulations depending on the date of filing. Claims filed prior to July 1, 1973 (Part B claims) are adjudicated by the Social Security Administration (SSA) pursuant to regulations codified at 20 C.F.R. Pt. 410. 30 U.S.C. 924, 925. Claims filed on or after that date (Part C claims) are adjudicated by the Secretary of Labor. 30 U.S.C. 925, 931. For Part C claims filed prior to April 1, 1980, the governing standards are the Secretary of Labor's "interim regulations," codified at 20 C.F.R. Pt. 727, which Congress required to be no more restrictive than the SSA regulations for Part B claims (30 U.S.C. 902(f)). Part C claims filed on or after that date are governed by the Secretary's permanent criteria, codified at 20 C.F.R. Pt. 718. 20 C.F.R. 725.4(a).

At issue in this petition are the interim regulations and the proof scheme they establish for adjudicating claims for benefits filed by miners with at least 10 years' coal mine employment. Under that scheme (20 C.F.R. 727.203), such miners need not prove all three elements of a claim (pneumoconiosis, disability, and

January 1, 1970, where a responsible operator cannot be identified, and in certain cases that are reopened after initial denial. 30 U.S.C. 932(c)(1), (2), and (j)(3), 934. The Fund is financed by an excise tax on the sale of coal (see 26 U.S.C. 4121) and has the power to borrow from the United States Treasury when its expenditures exceed its income (26 U.S.C. 9501(c)). The Fund is currently 2.9 billion dollars in debt to the federal treasury.

causation by coal mine employment). Rather, by establishing certain limited "basic facts," they may invoke a presumption of compensable total disability; the employer or Director may then rebut the presumption. Specifically, Subsection (a)[2] provides that a miner who engaged in coal mine employment for at least 10 years is presumed to be totally disabled due to coal workers' pneumoconiosis arising out of that employment if any one of four specified medical evidentiary requirements is met.[3] Subsection (b) provides that the presumption is rebutted if it is shown that the miner is not in fact disabled, that he does not suffer from pneumoconiosis, or that his disability does not arise, even in part, from coal mine employment.[4] The statute (30 U.S.C. 923(b)) requires that "all relevant evidence" be considered "where relevant" in adjudicating claims, and Subsection (b) mirrors that requirement.

2. All three cases below began when the non-federal respondents, who are miners or former miners, filed claims for benefits with the federal respondent. Each claim was initially decided by the Office of Workers' Compensation Programs' Deputy Commissioner. 20 C.F.R. 725.418, 725.419. In each case, the non-prevailing party requested a hearing

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[2] Unless otherwise indicated, "Subsection —" refers to a subsection of 20 C.F.R. 727.203.

[3] 20 C.F.R. 727.203(a) states:

> * * * A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);
>
> (2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than [specified] values * * *
>
> (3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than [specified] values * * *
>
> (4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment; * * *.

Subsection (a)(5), which provides for lay evidence in the case of a deceased miner where no medical evidence is available, is not at issue in this petition.

[4] 20 C.F.R. 727.203(b) states:

> * * * In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:
>
> (1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or
>
> (2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or
>
> (3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or
>
> (4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

before an administrative law judge (ALJ) (see 20 C.F.R. 725.419(a), 725.451), who rendered a decision after receiving further evidence (see 20 C.F.R. 725.476, 725.477). In respondent Stapleton's case, the ALJ invoked the presumption based on a single positive X-ray but then found the presumption rebutted (Pet. App. 106a-117a). In respondent Ray's case, the ALJ refused to invoke the presumption, weighing the evidence and finding it unpersuasive in any of the categories (Pet. App. 125a-134a). In respondent Cornett's case, the ALJ invoked the presumption based on the weight of the evidence in three categories and then found the presumption unrebutted (Pet. App. 141a-151a).

The ALJ decisions were appealed to the Benefits Review Board, which reviewed them for substantial evidence and conformity with law (see 30 U.S.C. 932(a)—incorporating 33 U.S.C. 921(b)(3)) and affirmed in all three cases. In Stapleton's case, the Board affirmed the ALJ's ruling but held that the presumption should not have been invoked based on a single piece of evidence (Pet. App. 102a-105a). In Ray's case, the Board affirmed the ALJ's finding that Ray was not entitled to the presumption (Pet. App. 118a-124a). In Cornett's case, the Board affirmed the ALJ's invocation of the presumption and finding of no rebuttal (Pet. App. 138a-140a, 135a-137a).

3. The unsuccessful parties before the Board filed petitions for review in the Fourth Circuit. The court of appeals *sua sponte* ordered that the three cases be consolidated and heard *en banc* (Resp. App. 1-3). The court directed the parties to address two questions regarding the proper interpretation of the interim regulations: whether a claimant could invoke the presumption with a single piece of "qualifying"

medical evidence;[5] and whether, and if so to what extent, non-qualifying medical evidence could rebut the presumption. The court requested the parties to address these issues in light of its previous panel decisions in *Hampton* v. *United States Dep't of Labor Benefits Review Bd.*, 678 F.2d 506 (4th Cir. 1982), *Consolidation Coal Co.* v. *Sanati*, 713 F.2d 480 (4th Cir. 1983), and *Whicker* v. *United States Dep't of Labor Benefits Review Bd.*, 733 F.2d 346 (4th Cir. 1984).[6]

The Director, who had not participated in the administrative proceedings, intervened in the appeal. The Director argued that a claimant could invoke the presumption only by a preponderance of the medical

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[5] Medical evidence is "qualifying" if it is positive, in the sense that it would suffice, in the absence of any contrary evidence of the same type, to invoke the presumption. For example, an X-ray that disclosed pneumoconiosis or ventilatory studies that revealed a respiratory or pulmonary impairment of the specified magnitude would be qualifying evidence. Negative results on an X-ray or in ventilatory studies would, by contrast, be "non-qualifying."

In addition, as Subsection (a) itself indicates, all medical evidence is subject to regulatory standards for quality. See, *e.g.*, 20 C.F.R. 410.428(a)(1), (b), and (c) (X-ray, biopsy, and autopsy standards) (incorporated in 20 C.F.R. 727.203(a)(1), 727.206(a)); 20 C.F.R. 410.430 (ventilatory study standards) (incorporated in 20 C.F.R. 727.203(a)(2)); Subsection (a)(3) (blood gas study standards).

[6] In *Sanati*, the court agreed with the Director that physicians' reports must be weighed in order to determine whether the presumption should be invoked under Subsection (a)(4). In *Hampton* and *Whicker*, the court placed significant restrictions on the range of permissible rebuttal evidence, ruling that a doctor's opinion based in part upon non-qualifying ventilatory function and blood gas test results constituted "improper rebuttal evidence." 678 F.2d at 508.

evidence in a particular category—for example, by proving the existence of pneumoconiosis by a preponderance of the X-ray, biopsy, and autopsy evidence (under Subsection (a)(1)), or by proving a totally disabling respiratory or pulmonary impairment by a preponderance of the "[o]ther medical evidence" (under Subsection (a)(1)), or by proving a totally argued that, once the presumption was invoked, the burden of persuasion shifted to the employer or Director. He argued that, at the rebuttal stage, non-qualifying medical evidence could be relevant, but only if submitted in support of a reasoned medical judgment. See Pet. App. 84a-87a (opinion of Sprouse J.) (quoting Director's brief). The Director further argued that facts already proven at the presumption stage could not be relitigated at the rebuttal stage, at least not with the same type of evidence.[7]

The court of appeals issued a per curiam opinion announcing the disposition of the three cases before it and referring, for the guiding rules of law, to various combinations of its four lengthy opinions.[8]

[7] For example, proof under Subsection (a)(1) of pneumoconiosis based on X-ray, biopsy, and autopsy evidence implies that the existence of pneumoconiosis may not be relitigated at the rebuttal stage, at least not without introducing relevant evidence other than X-ray, biopsy, or autopsy evidence. See Pet. App. 37a-40a (opinion of Phillips, J.) (summarizing Director's position).

[8] The court split into three groups. One group (Chief Judge Winter, Judge Hall, Judge Sprouse, and Judge Sneeden) was represented in two opinions—one by Judge Hall (Pet. App. 5a-33a), a second by Judge Sprouse (Pet. App. 56a-92a). A separate group of four judges expressed its views in an opinion by Judge Phillips (Pet. App. 34a-55a), which Judges Russell, Murnaghan, and Ervin joined. A third group expressed its views in an opinion by Judge Widener (Pet. App. 93a-101a), which Judges Chapman and Wilkinson joined.

The first and third groups formed the majority on the invocation issue. The second and third groups formed the majority on the rebuttal issue.

The majority rejected the Director's preponderance standard and held that an otherwise eligible claimant needs to produce only one credible piece of qualifying evidence in any of the four categories specified in Subsection (a) to invoke the presumption of compensable disability (Pet. App. 3a).[9] A different majority held that all relevant medical evidence could be considered on rebuttal, including non-qualifying test results, subject only to the statutory limitation (30 U.S.C. 923(b)) that a single negative X-ray may not be the basis for denying benefits (Pet. App. 4a); this holding rejected the Director's view that non-qualifying evidence (*e.g.*, negative X-rays) should be admitted only in support of a reasoned medical opinion (see Pet. App. 25a-27a (opinion of Hall, J.)).

[9] The majority noted one exception, arising under Subsection (a)(4). Although a single qualifying physician's report suffices to invoke the presumption, in the absence of such a report, all other medical evidence must be weighed to determine if the presumption may be invoked under that subsection (Pet. App. 3a). Four of the judges who advocated this result agreed with the Director that the evidence in all categories should be weighed before the presumption is invoked (*id.* at 51a (opinion of Phillips, J.)); the three additional members of the court who concurred in this result apparently believed that the regulatory language, which requires invocation if "[o]ther medical evidence * * * establishes the presence of a totally disabling respiratory or pulmonary impairment," imposes by its plain terms a burden of persuasion (*id.* at 96a-97a (opinion of Widener, J.)).

Nevertheless, all the judges agreed with the Director that the rebutting party bears the burden of persuasion on rebuttal (see Pet. App. 4a; *id.* at 23a-25a (opinion of Hall, J.)).[10] Because the two divided holdings departed from the court's previous panel decisions, the court overruled the three panel decisions it had asked the parties to discuss when it set the cases for en banc hearing (see page 7, *supra*).

The court's holding that a claimant can generally invoke the presumption by a single qualifying test result—the ruling challenged in the petition before this Court—derives from three separate opinions. The majority pointed to the regulatory language and structure in support of its interpretation (see Pet. App. 20a, 23a (opinion of Hall, J.), 97a (opinion of Widener, J.)): for example, Subsection (a)(1) provides that the presumption is invoked if "[a] chest roentgenogram * * * establishes the existence of pneumoconiosis" (emphasis added); and the requirement that "all relevant medical evidence shall be considered" is included in Subsection (b), governing rebuttal, not Subsection (a), governing invocation of the presumption. One group in the majority also concluded that the Director's approach, by generally foreclosing relitigation at the rebuttal stage of facts established at the presumption stage, would violate the statutory and regulatory command that all relevant evidence be considered (see Pet. App. 21a (opinion of Hall, J.), 71a & n.10 (opinion of Sprouse,

[10] The court unanimously agreed with the Director (Pet. App. 29a-32a) that 20 C.F.R. 725.608(a) requires a liable coal mine operator to pay interest on past-due benefits accruing from the thirtieth day after the first agency decision granting the claim. That aspect of the court's decision is not at issue here.

J.)).[11] Finally, the majority concluded that a preponderance-of-the-evidence requirement would frustrate congressional intent to facilitate miners' efforts to prove their claims (Pet. App. 70a, 77a-83a (opinion of Sprouse, J.), 94a (opinion of Widener, J.)). The majority thus viewed the Director's interpretation as unreasonable (Pet. App. 17a-18a (opinion of Hall, J.)) and refused to defer to it.[12]

A minority of the court agreed with the Director that a claimant should be required to prove the facts necessary to invoke the presumption in any of the categories by a preponderance of the evidence (Pet. App. 34a-55a (opinion of Phillips, J.)). The minority urged deference to the Director's interpretation as a permissible reading of the regulation that is consistent with the statute (*id.* at 36a). Noting "the range of arguably reasonable interpretations that are possible with respect to the details of a regulation" such as this one, the dissenters found deference to the administrative interpretation essential "to encourage national uniformity of application" (*id.* at 36a n.2). They also relied on the regulation's requirement that a claimant "establish" the necessary

[11] The majority further concluded that the Administrative Procedure Act (APA), 5 U.S.C. 554, 556, 559, to the extent it establishes a burden of persuasion, had been superseded by the particular statutory and regulatory scheme for black lung benefits (Pet. App. 22a n.8 (opinion of Hall, J.), 93a (opinion of Widener, J.)).

[12] One group in the majority concluded, moreover, that the Director's position was merely a litigation position (Pet. App. 56a (opinion of Sprouse, J.)). The other group in the majority read the comments of the Secretary upon promulgation of the interim regulations (43 Fed. Reg. 36826 (1978)) as establishing the single-item-of-evidence view as the originally intended meaning and thought this evidence essentially decisive (Pet. App. 94a (opinion of Widener, J.)).

facts to invoke the presumption, just as the rebutting party, which the full court agreed bears the burden of persuasion, must "establish" its case (*id.* at 42a).[13] Finally, the dissenting judges argued that the majority was mistaken in thinking that the Director's interpretation renders the presumption irrebuttable: when a claimant has proved any of the "basic facts" by a preponderance of the evidence in a category (*e.g.*, when the claimant has proved pneumoconiosis by X-ray evidence under Subsection (a)(1)), the operator remains free to rebut the resulting "presumed facts" (*e.g.*, the mine-relatedness and totally disabling effect of proven pneumoconiosis) under Subsections (b)(1), (2), and (3).

Applying its new interpretation of the interim regulations to the three cases before it, the court of appeals first affirmed the Board's denial of benefits (though not its reasoning) in Stapleton's case, concluding that the ALJ properly invoked the presumption and properly found it rebutted (Pet. App. 5a). In Ray's case, the court vacated the Board decision, concluding that the ALJ should have invoked the presumption, and remanded for consideration of rebuttal (*ibid.*). In Cornett's case, the court affirmed the award of benefits, concluding that the presumption was properly invoked and not rebutted, but remanded for calculation of interest (*ibid.*).

DISCUSSION

We do not oppose the granting of the petition for a writ of certiorari. The decision of the court of ap-

[13] The dissenters further asserted that the preponderance standard was not only the usual standard in civil litigation but the standard dictated by the APA where, as here, no other standard was specified (Pet. App. 41a-42a n.6).

peals conflicts with decisions of other circuits, defeating uniformity not only in the courts of appeals but also in the administrative process. The decision will require relitigation of a large number of black lung claims decided in the administrative process under the Director's preponderance standard. We also believe that the rejection of the Director's reasonable interpretation of his own regulations was erroneous.

1. There is a conflict among the Fourth, Sixth, and Seventh Circuits on what proof is required for a claimant to invoke the interim presumption of compensable disability under Part C. The Sixth Circuit, relying on prior case law construing the essentially identical presumption applicable to Part B claims (20 C.F.R. 410.490(b)), has recently reaffirmed its view that a claimant under Part C may invoke the presumption only by a preponderance of the evidence in a particular category and has thus expressly "rejected the plurality view of the Fourth Circuit." *Back* v. *Director, OWCP*, 796 F.2d 169, 172 (1986); see also *Engle* v. *Director, OWCP*, 792 F.2d 63 (1986). The Seventh Circuit apparently takes a view different from both the Fourth and Sixth Circuits. Although the Seventh Circuit only two years ago appeared to adopt the view that a preponderance of the evidence is required at the presumption stage (see *Consolidation Coal Co.* v. *Chubb*, 741 F.2d 968, 972-974 (1984)), the court recently "reject[ed] * * * [the] assertion that the presumption * * * can be invoked only by a preponderance of the evidence" and held that a single qualifying doctor's opinion "permits—although it does not necessarily require" invocation of the presumption. *Amax Coal Co.* v. *Director, OWCP*, 801 F.2d 958, 962 (1986). See also *Kuehner* v. *Ziegler Coal Co.*, 788 F.2d 439, 440 (1986). Without noting so expressly, the Seventh

Circuit in *Amax* thus departed from its own prior practice and took a position contrary to that of the Fourth Circuit here.

This conflict is already significant and will become more so as other courts of appeals address the Fourth Circuit's new standard. See, *e.g.*, *Revak* v. *National Mines Corp.*, No. 86-3211 (3d Cir. argued Oct. 16, 1986). There are over 200 black lung cases pending in the courts of appeals, and most of those involve the interim regulations. Moreover, the Director estimates that the Fourth and Sixth Circuits together consider approximately 60 percent of all black lung litigation in the courts of appeals (35 percent in the Fourth Circuit, 25 percent in the Sixth Circuit). The ruling below thus requires the Benefits Review Board and the ALJs to apply different standards to different claimants, depending on the circuit in which a claim arises, in a large number of cases.

2. The decision below, as the overruling of three Fourth Circuit decisions and the rejection of the Director's position show, is a departure from prior law and administrative practice. The decision will therefore require administrative reconsideration of a substantial number of cases. The Office of Workers' Compensation Programs estimates that at least 10,000 of the 25,000 pending black lung cases involve the interim presumption. More than a third of those claims arise in the Fourth Circuit. The Fourth Circuit and the Benefits Review Board together have already remanded at least 80 cases for reconsideration in light of the new presumption standard. The added administrative burden undermines the agency's current efforts to reduce the backlog of pending cases this fiscal year.

3. The Director's long-held view of his own interim regulations is a reasonable construction that is

consistent with statutory requirements. As such, it is entitled to judicial deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

a. The Director has consistently maintained, since the promulgation of the interim criteria in 1978, that all like-kind evidence (*i.e.*, all evidence of the type specified in a particular Subsection (a) category—for example, blood gas studies in category (a)(3)) must be weighed in determining whether the claimant has met one of the four medical evidentiary requirements in Subsection (a) and is therefore entitled to invoke the presumption. The Benefits Review Board has, consistently, with one temporary exception,[14] reviewed ALJs' determinations regarding invocation of the presumption under a preponderance standard. See, *e.g.*, *Elkins* v. *Beth-Elkhorn Corp.*, 2 B.L.R. (MB) 1-683 (Ben. Rev. Bd. Nov. 7, 1979) (Subsection (a)(1)); *Strako* v. *Ziegler Coal Co.*, 3 B.L.R. (MB) 1-136 (Ben. Rev. Bd. May 14, 1981) (Subsection (a)(2)); *Lessar* v. *C.F. & I. Steel Corp.*, 3 B.L.R. (MB) 1-63 (Ben. Rev. Bd. Mar. 31, 1981) (Subsection (a)(3)). Similarly, prior to the Fourth Circuit decision in this case, the courts of appeals had, on numerous occasions, routinely reviewed for

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[14] In *Stiner* v. *Bethlehem Mines Corp.*, 3 B.L.R. (MB) 1-487 (Ben. Rev. Bd. June 30, 1981), the Board concluded that the presumption must be invoked under Subsection (a)(4) if a single reasoned medical opinion establishes the presence of a totally disabling respiratory or pulmonary impairment. The Board subsequently overruled that decision, *Meadows* v. *Westmoreland Coal Co.*, 6 B.L.R. (MB) 1-773 (Ben. Rev. Bd. Jan. 12, 1984), persuaded by the Fourth Circuit's reasoning in *Sanati, supra*.

substantial evidence the factfinder's weighing of the evidence presented by a claimant seeking to invoke the presumption. See, *e.g.*, *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 972-974; *Bozick* v. *Consolidation Coal Co.*, 735 F.2d 1017 (6th Cir. 1984); *Consolidation Coal Co.* v. *Sanati*, *supra*; *Markus* v. *Old Ben Coal Co.*, 712 F.2d 322, 326-327 (7th Cir. 1983). Indeed, as the court of appeals should have been aware, the Director had successfully urged adoption of the preponderance standard under Subsection (a)(4) in *Sanati* in 1982. Thus, it is the Fourth Circuit's reformulation of the evidentiary standard, and not the Director's interpretation of his regulations, that represents a departure from past administrative practice.[15]

b. The Director's interpretation is a permissible construction of the regulatory language. To begin with, as Judge Phillips pointed out (see Pet. App. 46a-47a n.11), the regulation is hardly a model of precise drafting. In any event, the regulatory language easily bears—indeed, strongly supports—the construction that the facts that warrant invocation of the presumption must be proved by weighing the evidence under the preponderance standard.

First, although Subsection (a)(1) speaks of "[a]" chest X-ray, biopsy, or autopsy establishing pneumoconiosis, the other categories expressly use inclusive terms in describing the evidence to be considered—the plural "studies" in Subsections (a)(2) and (3); the general "[o]ther medical evidence" in Subsection (a)(4). Likewise, the reference to "the documented opinion of *a* physician" in Subsection (a)(4) (emphasis added) is made only in a context that seems to require that the opinion be considered among all "[o]ther medical evidence." Most important, each of the four subsections that define methods for invoking the presumption explicitly provides that a presumption of disability is invoked only if specified facts are "establish[ed]" (Subsections (a)(1), (2), and (4)) or "demonstrate[d]" (Subsection (a)(3)). Even a single positive X-ray would not "establish" pneumoconiosis if other like-kind evidence convinced the trier of fact that pneumoconiosis was not likely to be present.[16] For evidence to "establish" a fact,

[15] The Secretary's comments issued in connection with the promulgation of the interim criteria (43 Fed. Reg. 36826 (1978)) do not establish the contrary. The comments are not even addressed to the issue of what standard of proof governs at the presumption stage. We read the comments to assert, at most, only that a single item of qualifying evidence *may* establish the facts necessary to invoke the presumption. Certainly, there is no evidence that the Director or the Benefits Review Board ever understood these comments to require the Fourth Circuit's view.

[16] One court, construing the rebutting party's parallel obligation to "establish" certain facts (Subsection (b)), noted that "[t]he plain meaning of the regulatory language * * * demonstrates that the [party bears a] burden of persuasion." *Alabama By-Products Corp.* v. *Killingsworth*, 733 F.2d 1511, 1514 (11th Cir. 1984). The courts of appeals, including the court below, have unanimously concluded that the rebutting party "establishes" its case only by proving by a preponderance of the evidence that the miner does not have pneumoconiosis, is not disabled, or is not disabled even in part as a result of coal mine employment. See Pet. App. 23a-25a (opinion of Hall, J.); *Kaiser Steel Corp.* v. *Director, OWCP*, 748 F.2d 1426, 1430 (10th Cir. 1984); *Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 124 (4th Cir. 1984); *Alabama By-Products* v. *Killingsworth*, 733 F.2d at 1513-1515; *Consolidation Coal Co.* v. *Smith*, 699 F.2d 446, 449 (8th Cir. 1983). See also *Palmer Coking Coal Co.* v. *Director, OWCP*, 720 F.2d

the evidence must be evaluated; and the evaluation process is reasonably construed—indeed, is most reasonably construed—to include all other like-kind evidence.

c. The Director's interpretation of his regulation sets out an orderly and sensible method of considering "all relevant medical evidence" (Subsection (b)). The ALJ must first ascertain whether any evidence supporting invocation of the presumption meets applicable quality control standards. See note 5, *supra*. If such evidence exists, and is uncontroverted, the ALJ is compelled to invoke the presumption of compensable disability. Cf. *Ansel* v. *Weinberger*, 529 F.2d 304, 309 (6th Cir. 1976) (statutory presumption at 30 U.S.C. 921(c)(4)). If the evidence is controverted, the ALJ must focus, as would any other trier of fact, on the relative weight to be accorded each piece of evidence. *Director, OWCP* v. *Rowe*, 710 F.2d 251, 254-255 (6th Cir. 1983); *Peabody Coal Co.* v. *Benefits Review Bd.*, 560 F.2d 797, 802 (7th Cir. 1977) (citing *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403, 405 (2d Cir. 1961) and *Todd Shipyards Corp.* v. *Donovan*, 300 F.2d 741 (5th Cir. 1962)).

Several considerations are common in this weighing process. Because pneumoconiosis is a progressive disease, a later qualifying X-ray, ventilatory study, or blood gas study generally deserves more weight than an earlier negative result. See *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 973. Similarly, an X-ray interpretation by a well-qualified "B"-reader is usually more persuasive than an X-ray reading by a general practitioner. See *Sharpless* v. *Califano*, 585 F.2d 664, 666-667 (4th Cir. 1978). Likewise, a medical conclusion regarding disability, offered under

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1054, 1058 (9th Cir. 1983) (rebutting party "must produce sufficient evidence").

Subsection (a)(4), is more probative if rendered by the claimant's treating physician and based on objective tests and examination results than if rendered by a doctor who has examined the claimant only once or if unsupported by objective evidence. See 20 C.F.R. 410.471.

Weighing the evidence at the presumption stage means that certain rebuttal methods are precluded: in particular, the fact "established" to invoke the presumption cannot be relitigated based on the same kind of evidence (see, *e.g.*, Pet. App. 39a n.5 (opinion of Phillips, J.)). For example, if a claimant has invoked the presumption under Subsection (a)(4), he has necessarily proven by a preponderance of the medical evidence the presence of a totally disabling respiratory or pulmonary impairment. The rebutting party may then attempt to show that the disability is not due to coal mine employment (Subsection (b)(3)) or that the claimant does not have pneumoconiosis (Subsection (b)(4)); the rebutting party may also attempt to use *non-medical* evidence to show that the miner is not disabled within the meaning of Subsections (b)(1) and (2). But the operator cannot seek to have *medical* evidence bearing on disability reweighed. Similarly, if a claimant has invoked the presumption under Subsection (a)(1), he has proven that he suffers from pneumoconiosis by the weight of the X-ray, biopsy, and autopsy evidence.[17] The

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[17] Contrary to the majority's conclusion below (Pet. App. 71a n.10 (opinion of Sprouse, J.)), if a claimant attempts to invoke the presumption under Subsection (a)(1) based on X-ray evidence, biopsy or autopsy evidence showing that the claimant does not suffer from pneumoconiosis would be considered before the presumption is invoked. See *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 974.

rebutting party can dispute disability or mine-relatedness but cannot seek to prove the nonexistence of pneumoconiosis under Subsection (b)(4) solely on the basis of evidence in this category.[18]

This scheme does not render the presumption irrebuttable. It simply allocates certain issues and evidence to the presumption stage and prohibits relitigation of the same issues based on the same evidence. A claimant who successfully invokes the presumption will not have "established" all elements of entitlement to benefits. Rather, for each of the categories of Subsection (a), the claimant proves only certain "basic facts" with only certain evidence (*e.g.*, pneumoconiosis under Subsection (a)(1) with X-ray, biopsy, and autopsy evidence). All the "presumed facts" (*e.g.*, disability and mine-relatedness in the case of Subsection (a)(1) presumption) remain open on rebuttal, as do the basic facts to the extent there is relevant evidence different in kind from that offered at the presumption stage. See Pet. App. 39a n.5 (opinion of Phillips, J.); note 18, *supra*.

The statute itself supports the foreclosure of certain issues in a presumption-rebuttal proof scheme. Under 30 U.S.C. 921(c)(4), a miner with 15 years' coal mine employment who "demonstrates the existence of a totally disabling respiratory or pulmonary impairment" is entitled to a presumption that he is totally disabled due to pneumoconiosis. That pre-

[18] Based on current medical knowledge, X-ray, biopsy, and autopsy evidence are today the only reliable diagnostic tools for identifying pneumoconiosis, and so the rebutting party cannot, as a practical matter, attempt to show that the miner does not suffer from some form of clinical pneumoconiosis. A physician's opinion on the source of the clinical pneumoconiosis, however, would certainly be admissible in rebuttal.

sumption may be rebutted, however, "only by establishing" that the miner does not have pneumoconiosis or that his disability did not arise from coal mine employment. See, *e.g.*, *Ansel* v. *Weinberger*, 529 F.2d at 310. See also *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. at 51 (Stewart, J., concurring in part and dissenting in part). The issue of disability is not open for relitigation on rebuttal. The interim presumption, under the Director's interpretation, works in much the same way.

d. The Director's interpretation of the proof scheme established by the interim regulations is not only a sensible reading of the regulatory language, but is also consistent with statutory requirements and congressional intent. The Director's construction plainly allows consideration of "all relevant evidence * * * where relevant" (30 U.S.C. 923(b)). The difference between the Director's interpretation and the Fourth Circuit's is not whether, but where, evidence is considered.

Moreover, the Director's interpretation gives full effect to the requirement of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2, 92 Stat. 96, that the Part C procedures may "not be more restrictive" than those applicable to Part B claimants (30 U.S.C. 902(f)(2)). As the legislative history plainly reveals, Congress believed that the Part B regulations satisfied its concerns that claimants receive the benefit of the doubt in this medically controversial area. See, *e.g.*, H.R. Rep. 95-151, 95th Cong., 1st Sess. 15 (1977); 124 Cong. Rec. 3426-3427 (1978) (remarks of Representative Perkins); *id.* at 3431. The statutory requirement thus clearly permitted the Secretary of Labor to promulgate regulations modeled on those applicable to Part B claims and to interpret them in parallel fashion.

In fact, that is what the Director's view of the interim regulation does. It has long been clear that all like-kind evidence is weighed in determining invocation of the presumption available to Part B claimants under 20 C.F.R. 410.490(b).[19] See, *e.g.*, *Vinston* v. *Califano*, 592 F.2d 1353, 1356-1359 (5th Cir. 1979); *Gober* v. *Matthews*, 574 F.2d 772, 775 (3d Cir. 1978); see also *Lawson* v. *Secretary*, 688 F.2d 436, 438-439 (6th Cir. 1982); *Hill* v. *Weinberger*, 430 F. Supp. 332 (E.D. Tenn. 1976); *Zirkle* v. *Weinberger*, 401 F. Supp. 945 (N.D. W.Va. 1975). Indeed, the Fourth Circuit itself, agreeing that X-ray evidence should be weighed in establishing entitlement to the Part B presumption, noted that "[w]e know of nothing in the Act * * * or * * * legislative history, to indicate that this fact is not *required* to be proved by a preponderance of the evidence as is every other fact

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[19] There is no difference relevant to this case between the Part B presumption regulation and the Part C interim presumption regulation. The Part B regulation provides, among other things, that a miner will be presumed totally disabled due to pneumoconiosis if "[a] chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis" or "[i]n the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or ventilatory disease" and "[t]he impairment * * * arose out of coal mine employment." The presumption is rebutted if "[t]here is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work" or "[o]ther evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work." 20 C.F.R. 410.490(b)

which is not presumed." *Sharpless* v. *Califano*, 585 F.2d at 667 (emphasis added).[20]

CONCLUSION

The Director does not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

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DECEMBER 1986

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[20] Although the APA, 5 U.S.C. 556(d), might support the Director's interpretation of his regulations (compare *Steadman* v. *SEC*, 450 U.S. 91, 96-102 (1981) (Section 556(d) imposes preponderance standard) with *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 403-404 n.7 (1983) (Section 556(d) "determines only the burden of going forward, not the burden of persuasion"), the APA does not require the Director's view. The burden of proof portion of Section 556(d) by its own terms does not apply when "otherwise provided by statute." Moreover, although the black lung statute (30 U.S.C. 932(a)) generally incorporates 33 U.S.C. 919(d), which in turn generally incorporates APA provisions, including Section 556(d), there is an express exception where "otherwise provided * * * by regulations of the Secretary" (30 U.S.C. 932(a)). Accordingly, the Secretary, and hence the Director, has the authority to depart from APA standards.

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(3)

No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY and JEWELL RIDGE COAL CORPORATION,

Petitioners,

v.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE NATIONAL COAL ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

BRIEF OF THE NATIONAL COAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE NATIONAL COAL ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The National Coal Association ("NCA") respectfully moves, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari of Mullins Coal Company, Incorporated of Virginia, *et al.*, in the above-captioned case. Counsel for Petitioners, the Solicitor General, and Westmoreland Coal Company have given written consent for the filing of this brief *amicus curiae* while the remaining parties have not responded.

NCA is a trade association whose members own or operate approximately fifty percent of the nation's coal-producing capacity.

NCA's attached brief provides more detail concerning its interest in the disposition of this case as well as arguments in support of the Petition for Writ of Certiorari. Accordingly, NCA respectfully moves for leave to file this brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE NATIONAL COAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus curiae National Coal Association respectfully submits that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered herein on February 26, 1986 in *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, should be granted.

INTEREST OF *AMICUS CURIAE*

The National Coal Association ("NCA") is a trade association comprising approximately 125 members. Its coal-producing members account for approximately fifty percent of the nation's coal production. In addition to coal-producing companies, the National Coal Association's membership includes coal brokers, equipment suppliers, coal transporters, consultants, and resource developers.

All U.S. coal producers share the cost of benefits payable to eligible persons under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (the "Act"). Benefit awards are payable either by an individual coal mine operator in certain cases, 30 U.S.C. §§ 932-933, or by the Black Lung Disability Trust Fund ("BLDTF" or the "Fund") in others, 30 U.S.C. § 934. The Fund is financed by a producer tax on coal, 26 U.S.C. §§ 4121, 9501, and is administered by the Secretaries of Labor, Treasury, and Health and Human Services, 26 U.S.C. § 9501(a)(2).

NCA producer members operate in every coal region of the United States. A number conduct mining operations only in states within the Fourth Circuit. Others operate in states within the federal circuits whose decisions conflict with the Fourth Circuit on the questions presented in the Petition. Yet others operate mines not only within the jurisdiction of the Fourth Circuit but also in states within the federal circuits whose decisions conflict with the Fourth Circuit on the questions presented.

The decision of the Court of Appeals will, therefore, affect NCA producer members both in their capacity as individual black lung litigants and as BLDTF taxpayers.

Regardless of where their operations are located, all NCA producer members are affected by the uncertainty in the law arising from the inability of the courts of appeals to agree upon the correct rules of proof and evidence in

black lung claims litigation. All mine operators that may be individually liable for claims arising within the Fourth Circuit are concerned that the Court of Appeal's holding will deeply undermine their ability to defend claims and will deprive them of the fair and equal treatment properly accorded all parties in Administrative Procedure Act litigation.

As BLDTF taxpayers, the nation's coal producers currently pay an excise tax of $1.10 per ton of underground-mined coal and $.55 per ton of surface-extracted coal.[1] This tax originated in the Black Lung Benefits Revenue Act of 1977[2] and has been increased by 120% in two amendments.[3]

The BLDTF is the sole source of benefits in claims which do not involve the liability of individual mine operators. This Fund has remained insolvent since its inception. Any increased disparity between revenues and benefit outlays can only exacerbate the Fund's tenuous economic stability achieved by temporary tax increases enacted by the Congress just this year, *see* note 1 *supra*. The Fourth Circuit's holding, which in practical terms will confer benefit of the Act's most powerful vehicle for entitlement on thousands of claimants on the basis of *ex parte* proof, can only serve to further destabilize the Fund's economic position. History teaches that yet further tax increases would be sure to follow.

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[1]26 U.S.C. § 4121(a)-(b), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, §13203(a), (d), 100 Stat. 312-13 (Apr. 7, 1986) ("1986 BLDTF amendment"). This amendment applies to sales after March 31, 1986.

[2]Pub. L. No. 95-227, § 2(a), 95 Stat. 11 (Feb. 10, 1978).

[3]Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102, 95 Stat. 1635 (Dec. 29, 1981); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), 100 Stat. 312 (Apr. 7, 1986).

ARGUMENT

THE QUESTION PRESENTED IN THE PETITION IS OF GREAT IMPORTANCE TO THE COAL MINING INDUSTRY OF THE UNITED STATES

1. The Financial Viability of the Fund is Placed in Jeopardy by the Fourth Circuit's Decision in *Stapleton v. Westmoreland Coal Co.*

The Fourth Circuit en banc in *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424 (4th Cir. 1986), has issued a decision that restructures the rules of evidence and procedure under the Act; these rules have been applied for almost 15 years in hundreds of thousands of claims.

The Court of Appeals held that black lung claimants seeking to invoke the key presumption of eligiblity for benefits in 20 C.F.R. § 727.203 (1986) will do so as a matter of law by presentation of any supporting evidence whether or not such evidence is credible or reliable, or the fact to be found on the basis of it is supported by a preponderance of the relevant evidence.

The Secretary of Labor has, heretofore, not followed the single-item-invocation rule of *Stapleton* in evaluating claims for payment by the BLDTF. The majority of pending claims that could result in payment from the BLDTF were filed between June 30, 1973 and April 1, 1980 and will be adjudicated under the 20 C.F.R. § 727.203(a) presumption, 30 U.S.C. § 902(f)(2). Many of these pending BLDTF claims arise in the Fourth Circuit, which includes within its jurisdiction the major coal mining states of Virginia and West Virginia.

If *Stapleton* is not reviewed and reversed by this Court, the Secretary of Labor will be obligated to apply the inequitable single-item-invocation rule in the sizeable

number of Fourth Circuit cases to be paid from the BLDTF. The effect on the BLDTF could be devastating.

The Fund has collected over $3.403 billion in tonnage taxes from coal producers since 1978.[4] For Fiscal Year 1986 (through August 31, 1986), the nation's coal producers have paid over $461,992,000 into the BLDTF.[5]

Despite these substantial tax revenues, there has been a continuing imbalance between black lung payments and the income from the producer tax. The BLDTF has paid out over $4.930 billion in compensation since 1978, and $1.032 billion in interest on the advances as accumulated.[6] In Fiscal Year 1986, the BLDTF will disburse over $632 million.[7] To meet the shortfall between tax revenues and compensation expenditures, the BLDTF has had to be augmented by appropriations from the general treasury each year since its inception in 1978. The Fund has received $2.83 billion in advances from the U.S. Treasury to cover this imbalance.[8] In Fiscal Year 1986 (through August 31, 1986), the BLDTF has received a total advance

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[4]Information supplied by James DeMarce, Associate Director for the Division of Coal Mine Workers Compensation, U.S. Department of Labor, in a telephone interview with Bruce Watzman, NCA (Sept. 26, 1986).

[5]U.S. Department of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Aug. 1986) (available through the Treasury Department).

[6]These figures were also supplied by Mr. DeMarce, *see* note 4 *supra*. The discrepancy between income to the Fund and benefit outlays in all likelihood reflects the costs of administering the BLDTF.

[7]These figures were also supplied by Mr. DeMarce, *see* note 4 *supra*.

[8]*Id.*

from the general treasury of over $50 million.[9] These advances must be repaid at some time in the future by the BLDTF to the general treasury with interest.[10] 26 U.S.C. § 9501(c), (d)(4).

Under a 1981 amendment to the Internal Revenue Code,[11] the tonnage tax is to revert to the 1978 rate of $.50/ton (underground) and $.25/ton (surface) by January 1, 1996, or when there is no balance of repayable advances and interest due the BLDTF, whichever date is earlier.[12] As noted above, current debt for the BLDTF from prior advances and interest is over $2.8 billion, and the ability of the Fund to achieve solvency by 1996 is questionable, even under pre-*Stapleton* conditions.[13] The Fund's condition will be far more unpredictable unless *Stapleton* is reviewed and reversed by this Court.

[9]U.S. Department of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Aug. 1986) (available through the Treasury Department).

[10]The 1986 BLDTF amendment placed a five-year moratorium on interest accruals with respect to repayable advances to the BLDTF, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(b), 100 Stat. 312 (Apr. 7, 1986).

[11]Pub. L. No. 97-119, § 102(a), 92 Stat. 1635 (Dec. 29, 1981).

[12]26 U.S.C. § 4121(e), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(c), 100 Stat. 313 (Apr. 7, 1986).

[13]In support of the Administration's recent proposal to increase the tax by 50%, the Department of Labor informed the Congress that "unless the present rates of the coal excise tax are increased this deficit could reach $30 billion by 2010." H.R. Rep. No. 241, 99th Cong., 2d Sess., pt. 1 at 75-76, *reprinted in* 1986 U.S. Code Cong. & Admin. News 653-54.

2. The American Coal Industry, Already in a Financially Vulnerable Condition, Could be Severely Injured By Imposing a Further and Unwarranted Burden on the Coal Producer

If *Stapleton* is not reviewed and reversed by this Court, the Labor Secretary, administrative law judges, and the Benefits Review Board will be obligated to apply the single-item-invocation rule of *Stapleton* in the sizeable number of Fourth Circuit cases potentially to be paid from the BLDTF.[14] The entitlement burden of the already-precarious BLDTF will then increase, thereby postponing reversion of the producer tax to the 1978-level of $.50/$.25 per ton and compelling more repayable advances from the general treasury. Clearly, delay in reversion of the black lung excise tax – or enactment of another tax increase – combined with the immediate effect of the Fourth Circuit's holding in claims involving direct mine operator liability would further erode the already marginal unit price advantage of coal over other fuels, and would impede marketing of long-term coal supply contracts.

It is of considerable significance that the Congress has devoted much effort toward striking a reasonable balance between the Fund's benefit payment obligations and the capability of the coal industry to meet them. In rejecting a 1985 Administration proposal to increase the coal tax by 50%, the Congress took great pains to enact a much smaller (10%) compromise tax increase which, it was hoped, would accommodate the competing demands of the Fund and the

[14]The BLDTF may also be subject to assertion of *Stapleton* by previously denied claimants who had not perfected appeals to the Benefits Review Board or the U.S. Court of Appeals. These claimants could conceivably argue that their apparently closed claims should be reopened and reviewed pursuant to the invocation rule in *Stapleton*.

pressing financial realities facing the coal industry.[15] Senator Heinz, an advocate of compromise, stated on the Senate floor:

> The additional tax increase proposed by the Ways and Means Committee, would exacerbate this alarming trend. A significant increase in the black lung excise tax would contribute to the loss of both domestic and international markets for [the] coal industry. Because we on the Finance Committee recognized the impact a large coal tax increase would have on the coal industry, we opposed the tax . . . .
>
> . . . .
>
> . . . However, I believe that it is possible for the conferees to find a compromise . . . .

131 Cong. Rec. S15,479 (daily ed. Nov. 14, 1985) (remarks of Sen. Heinz).

Indeed, the Congress' concerns are well founded. An independent study conducted for, but not controlled by NCA, highlighted the difficulties facing the coal industry:

> [T]he once characteristic rapid growth of the coal industry has slowed to a modest 1.8 percent annual rate over the past five years.
>
> Competitive pressures from alternative fuels, primarily oil and gas, have resulted in significant productivity increases *and a slow decline in the real price of coal.* During the period from 1978 to 1983, productivity rose 41 percent, reflecting results from more efficient mining techniques and

[15] *See, e.g.*, 131 Cong. Rec. S15,477-80 (daily ed. Nov. 14, 1985). In particular, see the remarks of Senator Warner, 131 Cong. Rec. S15,478 (daily ed. Nov. 14, 1985). *See also* the BLDTF amendment, Pub. L. No. 99-272, § 13203(a), (c), 100 Stat. 312-13 (Apr. 7, 1986).

> heavy capital investment in more efficient production equipment. Employment, however, fell dramatically over the same time period . . . from 224,203 in 1979 to 173,543 in 1983. Current employment is estimated to be approximately 175,000. . . .
>
> International competitive pressures are also playing a major role in the domestic coal market. . . . In four years, total tonnage of coal exported from the United States dropped nearly 28 percent.[16]

The Fourth Circuit's holding will substantially increase the rate of awards in the many thousands of claims arising within the Circuit. This, in turn, can only upset the expectations of both the Congress and the coal industry reflected in the carefully structured funding mechanism agreed upon in 1986. The industry is in no position to absorb these added liabilities and we are certain that the Congress harbored no intent or expectation that they would be newly imposed at this late date.

3. The Issue is in a Proper Posture for Consideration By the Court

This Court's authoritative guidance is needed to resolve the conflicting views of the circuits, to restore consistency in black lung claims litigation, and to preserve the intent and expectations of the Congress and claim litigants. The Petition for Writ of Certiorari provides an appropriate vehicle for delivery of that guidance. It presents the issues clearly and in an uncomplicated factual setting.

[16] Price Waterhouse, *The Economic Impact of the President's Tax Reform Proposals on the Coal Industry, Final Report* 3 (Sept. 1985) (emphasis added).

CONCLUSION

The members of NCA urge the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: October 20, 1986

No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY AND JEWELL RIDGE COAL CORPORATION,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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March 19, 1987

QUESTIONS PRESENTED

1. Do the Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945, and 20 C.F.R. § 727.203 (1986) require invocation of the benefit eligibility presumption contained in 20 C.F.R. § 727.203 upon the presentation of any evidence, without regard to its weight, accuracy, reliability, or probative value?

2. May the court of appeals refuse to accord deference to the consistent, fifteen-year-long interpretation of the presumption by the Secretaries of Health and Human Services and Labor, that the presumption may be invoked only upon proof of an invoking fact by a preponderance of the evidence?

3. Are the rules of proof contained in Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), superseded in black lung adjudications by any provision of law, in keeping with the rule against supersedure of 5 U.S.C. § 559?

4. Under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), may a black lung claimant establish invocation of the presumption contained in 20 C.F.R. § 727.203 without proving invocation facts by a preponderance of the evidence?

LIST OF PARTIES

This case involves three separate claims for black lung benefits consolidated in the Court of Appeals. Glenn Cornett, a claimant, and the Mullins Coal Company, Incorporated of Virginia ("Mullins"), Cornett's former employer, were respondent and petitioner, respectively, in the Court of Appeals. The Old Republic Insurance Company ("Old Republic") is the black lung insurance carrier for Mullins and was a petitioner in the Court of Appeals. Luke Ray, claimant, and his last employer, the Jewell Ridge Coal Corporation ("Jewell"), were petitioner and respondent, respectively, in the Court of Appeals. Gerald Stapleton, claimant, and his last employer, the Westmoreland Coal Company, were petitioner and respondent, respectively, in the Court of Appeals.

The Director, Office of Workers' Compensation Programs, United States Department of Labor, is the administrator of the Black Lung Program and intervened in all three cases before the Court of Appeals. The Director, as authorized by the Secretary of Labor, is a statutory party in all black lung claim proceedings, 30 U.S.C. § 932(k).

Mullins, Old Republic and Jewell are the petitioners herein and all other parties are respondents.

A list in compliance with Rule 28.1 is set forth in the Petition for Certiorari at ii, and remains unchanged.

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TABLE OF AUTHORITIES

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,

Respondents.

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals in *Stapleton* v. *Westmoreland Coal Co.* is reported at 785 F.2d 424 and is reprinted in the Appendix to the Petition for Writ of Certiorari (Pet. App. 1a).[1] The order of the Court of Appeals denying rehearing is unpublished and is reprinted in the Appendix (Pet. App. 152a). In Cornett's claim, the order of the Benefits Review Board denying reconsideration (Pet. App. 135a), the decision and order of the Benefits Review Board (Pet. App. 138a), and the decision and order of the administrative law judge (Pet. App. 141a) are all unreported and are reprinted in the Petitioners' Appendix as noted. In Ray's claim, the decision and order of the Benefits Review Board (Pet. App. 118a) and the decision and order of the administrative law judge (Pet. App. 125a) are unreported and

1. Petitioners' *Motion to Dispense With the Printing of the Joint Appendix* was granted on February 23, 1987. Citations to the Petitioners' Appendix ("Pet. App.") in this Brief refer to the Appendix to the Petition for Writ of Certiorari.

are reprinted in the Petitioners' Appendix as noted. In Stapleton's claim, the decision and order of the Benefits Review Board (Pet. App. 102a) and the decision and order of the administrative law judge (Pet. App. 106a) are unreported and are reprinted in the Petitioners' Appendix as noted.

JURISDICTION

The decision of the Court of Appeals was entered on February 26, 1986. A timely petition for rehearing was denied on April 21, 1986. On July 8, 1986, the time for filing the petition for a writ of certiorari was extended to August 29, 1986 (Pet. App. 155a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

Jurisdiction was conferred on the Court of Appeals in each of the three cases by the filing of a timely petition for review of a decision and order of the Benefits Review Board, United States Department of Labor, in accordance with 33 U.S.C. § 921(c) as incorporated by reference into 30 U.S.C. § 932(a).

STATUTES AND REGULATIONS INVOLVED

1. 20 C.F.R. § 727.203 (1986) (the "Interim Presumption") (also at Pet. App. 156a-158a).

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title [20 C.F.R. § 410.428 (1986)]);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements

for duration in § 410.412(a) (2) of this title [20 C.F.R. § 410.412(a) (2) (1986)]) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40-45	60
Above 45	Any value

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a) (1) of this title [20 C.F.R. § 410.412(a) (1) (1986)]); or

(2) In light of all relevant evidence, it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a) (1) of this title [20 C.F.R. § 410.412(a) (1) (1986)]); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 [20 C.F.R. Part 718] of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

2. The following additional statutes, regulations and other authorities are reprinted in the Petitioners' Appendix:

(a) Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (Pet. App. 166a).

(b) Section 12 of the Administrative Procedure Act, 5 U.S.C. § 559 (Pet. App. 167a).

(c) Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a) (Pet. App. 168a).

(d) Section 19(d) of the Longshore Act, 33 U.S.C. § 919(d) (Pet. App. 169a).

(e) Published Commentary on 20 C.F.R. § 727.203, 43 Fed. Reg. 36,826 (1978) (Pet. App. 158a).

(f) 20 C.F.R. § 410.490 (1986) (Pet. App. 163a).

STATEMENT OF THE CASE

A. Description of the Issues

The Black Lung Benefits Act, its implementing regulations as consistently construed by the Secretaries of Labor and of Health and Human Services, and the Administrative Procedure Act require that an "interim presumption" of eligibility for black lung benefits, prescribed by rule, must be established by a preponderance of credible, relevant evidence. The Fourth Circuit disagreed, holding that *any* evidence will do and that such evidence cannot be challenged. Petitioners seek a reversal of the Fourth Circuit's holding and a return to the long-standing and fair rule that invocation is accomplished only upon a finding that it is justified by a preponderance of the reliable, probative, and substantial evidence.

B. Background of the Black Lung Benefits Program and Impact of Decision Below

The Black Lung Benefits Act, as amended,[2] 30 U.S.C. §§ 901-945("the Act"), establishes a federally administered workers' compensation program that provides employer-funded benefits to coal miners and their families because of a miner's total disability

2. Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, 95 Stat. 1643, and the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635, and Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a)(d), 100 Stat. 312, 313 (1986).

or death due to pneumoconiosis ("black lung" disease) arising out of coal mine employment.

During the course of this complex administrative program, nearly one million claims have been filed and hundreds of thousands of claimants have received billions of dollars in benefits.[3] The average cost of a single black lung claim over a twenty-year period has been estimated by the Department of Labor as $118,315.88 in the case of an unmarried miner and $185,659.69 in the case of a married miner. U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* 32 (1981). Thousands of cases are still pending.[4]

In administratively processing this staggering number of claims, the liability issue has, as a practical matter, turned on whether or not a particular claimant was able to invoke a presumption of eligibility for benefits (called the "interim presumption"). This presumption is an exceptionally powerful vehicle for entitlement. Until this case, both administering agencies and the courts had required claimants to carry the burden of proving the basis for invocation by a preponderance of the evidence. The court below held that *any* single piece of evidence, regardless of reliability or weight, is sufficient to invoke the presumption. The defendant, in turn, has no right to question or challenge claimant's invoking evidence.[5] This holding greatly impairs the ability

3. U.S. Dep't of Labor, *Black Lung Program Claims Status Report* (1987).

4. The huge backlog of pending claims prompted Congress to increase the size of the Benefits Review Board from three to five permanent and four temporary members in 1984. H.R. Rep. No. 1027, 98th Cong., 2d Sess. 33-34 (1984). The huge ALJ backlog prompted a special appropriation of funds to the Office of Administrative Law Judges in 1985.

5. In *Back* v. *Director, Office of Workers' Compensation Programs*, 796 F.2d 169, 172 (6th Cir. 1986), and *Engle* v. *Director, Office of Workers' Compensation Programs*, 792 F.2d 63, 64 n.1 (6th Cir. 1986), the Sixth Circuit has expressly rejected *Stapleton*, holding instead that invocation occurs only if an invocation fact is established by a preponderance of the evidence. Subsequently, in *Revak* v. *National Mines Corp.*, 808 F.2d 996 (3d Cir. 1986), the Third Circuit has adopted the view of the Fourth Circuit, overruling *sub silentio* its prior decision in *Gober* v. *Matthews*, 574 F.2d 772 (3d Cir. 1978). In *Amax Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 801 F.2d 958, 962 (7th Cir. 1986), the Seventh Circuit held that a single untested item of evidence "permits—although it does not necessarily require" invocation.

of mine operators to defend questionable claims. It will disrupt the litigation of tens of thousands of claims and, if affirmed, will require the retrial of many.

C. Background of These Cases

Respondents Cornett, Ray and Stapleton ("claimants") are former coal miners who filed claims for benefits with the U.S. Department of Labor. Each alleged total disability due to coal mine employment-related pneumoconiosis. Mullins, Jewell and Westmoreland are the last coal mine operators to have employed Cornett, Ray and Stapleton, respectively. A miner's most recent coal mine employer is generally liable for the payment of benefits awarded, if any. 20 C.F.R § 725.493(a) (1986).

In each of these claims, the employer contested liability on the grounds that the miner neither had occupational lung disease nor suffered any disability related to coal dust exposure. In each case, the claimant, the employer and the Department of Labor separately obtained and submitted medical data and other relevant evidence into the claim record. Much of the medical evidence submitted in all three claims was in sharp conflict.

To determine claimants' eligibility in these cases, the adjudicator evaluated the record according to a variety of statutory and regulatory definitions, presumptions and rules of evidence. These provisions vary depending upon the date the claim was filed and the identity of the federal agency with which the claim is filed.[6] All claims filed with the Labor Department prior to April

6. Claims originally submitted prior to July 1, 1973 were filed with and adjudicated by the Social Security Administration (SSA). Claims submitted after June 30, 1973 were to be filed under an approved state workers' compensation law, 30 U.S.C. § 931, or absent such a law, with the Secretary of Labor. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 8-9 (1976). No state's law was ever approved. SSA eligibility criteria are set forth at 20 C.F.R. Pt. 410, Subpart D (1986). For Labor Department claims filed prior to April 1, 1980, eligibility criteria are codified at 20 C.F.R. Pt. 727 (1986). Criteria applicable to Labor Department claims filed after March 31, 1980 are set forth at 20 C.F.R. Pt. 718 (1986).

1, 1980, including these three, must be considered under the "interim presumption."

D. History of the Interim Presumption

The Social Security Administration ("SSA") commenced its segment of the black lung program in 1970 and promulgated benefit eligibility standards. 36 Fed. Reg. 23,752-70 (1971). In late 1971 and early 1972, some members of Congress expressed concern over SSA's claims approval rate, noting that it suggested a less than complete "solution."[7] S. Rep. No. 743, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2305, 2307.

This inquiry produced the Black Lung Benefits Act of 1972, 86 Stat. 150, which liberalized eligibility standards through the creation of a new presumption, 30 U.S.C. § 921(c)(4); revised the definitions of "pneumoconiosis" and "total disability," 30 U.S.C. § 902(b), (f); and prohibited the denial of a claim solely on the basis of a single negative chest x-ray. 30 U.S.C. § 923(b). *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 10-12 (1976). In evaluating proposed amendments, the Senate Committee on Labor and Public Welfare addressed administrative difficulties experienced by SSA as a result of the unexpectedly large volume of claim filings and the limited availability of certain medical testing facilities in coal mining regions. S. Rep. No. 743, *supra*, 1972 U.S. Code Cong. & Ad. News at 2322-23.

The Committee's Report stated:

> ... [T]he backlog of claims which have been filed ... cannot await the establishment of new facilities or the development of new medical procedures. They must be handled under present circumstances in the light of limited medical resources and techniques.
>
> Accordingly, the Committee expects the Secretary [HEW] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these amendments. ...

Id.

After enactment of the Black Lung Benefits Act of 1972, SSA published a regulation entitled *Interim Adjudicatory Rules for Certain Part B Claims Filed by a Miner Before July 1, 1973, or by a Survivor of a Miner Where the Miner Died Before January 1, 1974*. 20 C.F.R. § 410.490 (1986) (Pet. App. 163a). By virtue of its application to claims filed before the dates stated, the provision could not be applied in "Part C" (Department of Labor) claims, and Labor's regulations expressly so provided.[8] 20 C.F.R. § 718.2, 38 Fed. Reg. 16,965 (1973) (repealed 1978).

SSA's interim rules established a rebuttable presumption of a claimant's entitlement to benefits which could be invoked if (a) a chest x-ray, biopsy or autopsy "establish[ed] the existence of pneumoconiosis," 20 C.F.R. § 410.490(b)(1)(i); or (b) the miner had at least 15 years of dust exposure and specified values on pulmonary function tests "establish[ed] the presence of a chronic respiratory or pulmonary disease," 20 C.F.R. § 410.490(b)(1)(ii); and (c) if under either provision occupational causation was established or otherwise presumed. 20 C.F.R. § 410.490(b)(2)-(3). Rebuttal was permitted upon proof that the miner was not totally disabled due to the disease. 20 C.F.R. § 410.490(c).

Under the 1972 Act and the "interim" rules, SSA's claims approval rate increased significantly.[9] The Labor Department, in the early years of its program, approved a lower percentage of

7. The SSA or "Part B" Program was designed to remedy the past failure of state workers' compensation laws to provide adequate coverage for death or total disability due to pneumoconiosis. H.R. Rep. No. 460, 92d Cong., 1st Sess. 2 (1971), *reprinted in* House Comm. on Labor and Public Welfare, Subcomm. on Labor, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969, as Amended Through 1974*, 1725 (1975). Part B benefits were and continue to be federally financed.

8. Prior to March 1, 1978, only SSA had authority to develop medical eligibility criteria for both segments of the Program. Federal Coal Mine Health and Safety Act of 1969, § 402(f), 83 Stat. 793, as amended by the Black Lung Benefits Act of 1972, § 4(a), 86 Stat. 150 (1972).

9. *See* Dep't of HEW, SSA, *2d Ann. Rep. to the Congress on the Administration of the Black Lung Benefits Act of 1972* (1977).

claims than did SSA. The Labor Department Program was quite different in many respects. Benefits were to be paid by a mine operator. The operator was permitted to contest questionable claims.[10] Other statutory and regulatory differences distinguished the two programs and, of course, the interim presumption did not apply in Labor Department claims.

Labor's comparatively low approval ratio prompted inquiry. The inapplicability of the interim presumption was considered an important reason for this disparity. *Oversight of the Administration of the Black Lung Program, 1977: Heartngs Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 49 (1977) [hereinafter *1977 Senate Hearings*]; *Hearings on H.R. 3476, H.R. 8834, H.R. 8835 and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 329, 341, 349, 399 (1973-74).

Legislative efforts to make the presumption applicable to Labor Department claims then began.[11] The matter prompted spirited discussion in congressional proceedings. SSA believed that the presumption was legally inappropriate for use in claims involving the liability of individual mine owners.[12] Two SSA staff physicians testified that the presumption was scientifically

10. Section 422(a) of the Act, 30 U.S.C. § 932(a), incorporates by reference many of the claims adjudication procedures prescribed in the Longshore Act. 33 U.S.C. §§ 901-952. Under 33 U.S.C. § 919(a)-(c), claims are first informally considered by a Labor Department employee. If agreement is not reached, any party may request a hearing to be conducted by an administrative law judge (ALJ) qualified under 5 U.S.C. § 3105, and in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 554. An aggrieved party may appeal an ALJ's decision to the Benefits Review Board and, if unsuccessful, to the United States court of appeals for the circuit in which the injury occurred. The Board and the court review the ALJ's decision to determine whether it is supported by substantial evidence and in compliance with law. 33 U.S.C. § 921(b), (c).

11. *E.g.*, H.R. 7, 94th Cong., 1st Sess. § 8 (1975); H.R. 2913, 94th Cong., 1st Sess. § 3 (1975); H.R. 3333, 94th Cong., 1st Sess. § 3 (1975).

12. S. Rep. No. 770, 94th Cong., 1st Sess. 11-21 (1975), *reprinted in* House Comm. on Education and Labor, *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* 113, 123-31 (Comm. Print 1979) [hereinafter *1977 Legislative History*].

unsound, noting in effect that the facts presumed after invocation were not supported by the facts proven, and that the presumption, more than anything else, reflected a policy choice by SSA which would assist in eliminating the agency's backlog.[13] Labor Department officials also testified that the presumption was not appropriate for Part C claims. Labor requested new legislative authority to write its own medical eligibility rules.[14] Other witnesses called for a liberalization of the Part C eligibility criteria.[15] The Comptroller General of the United States reported to the Congress that SSA claimed an inability to rebut its interim presumption as a result of limited resources, thus producing unsubstantiated awards. He suggested that Congress consider application of the presumption in Labor Department claims, but that such application should direct the Labor Department to substantiate entitlement by medical evidence.[16]

When final bills were produced, the House version required application of the presumption in all claims.[17] The Senate bill permitted the Secretary of Labor to design and adopt his own eligibility criteria.[18] The compromise that emerged authorized Labor to write new standards of entitlement but also required

13. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA) [hereinafter *1977 House Hearings*]; *1977 Senate Hearings, supra* p. 10, at 193-95 (testimony of Dr. Herbert Blumenfeld, Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA).

14. *1977 Senate Hearings, supra* p. 10, at 154; *1977 House Hearings, supra* note 13, at 241 (testimony of Donald Elisburg, Assistant Secretary of Labor).

15. *See* S. Rep. No. 1254, 94th Cong., 2d Sess. 11 (1976), *reprinted in 1977 Legislative History, supra* note 12, at 336; *1977 Senate Hearings, supra* p. 10, at 196.

16. Comptroller General of the United States, *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and Their Survivors—Improvements are Needed*, 43-47, 52 (1977), *reprinted in 1977 Senate Hearings, supra* p. 10, at 316-320, 325.

17. H.R. 4544, 95th Cong., 1st Sess. § 7(a) (1977).

18. S. 1538, 95th Cong., 1st Sess. § 2 (1977); *1977 Legislative History, supra* note 12, at 515-17.

application of the interim presumption in approximately 220,000 pending and previously denied claims, and in all new claims filed prior to Labor's publication of new criteria.[19] The compromise was implemented by 30 U.S.C. § 902(f)(2), which provides:

> Criteria applied by the Secretary of Labor in the case of—[certain categories of claims filed prior to publication of Labor's new regulations] shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

The conferees cautioned the Labor Secretary that SSA's history of making unsubstantiated awards was not to be repeated—

> With respect to a claim filed or pending prior to the promulgation of such [new] regulations, such regulations [the presumption] shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.[20]

On the date of enactment by the Senate, Senator Javits, a conferee and supporter of the bill, stated:

> The "interim" standards as they were applied to determine benefit claims under Part B, have been highly controversial and widely criticized . . . .
>
> I therefore requested that the statement of managers include language to the effect that "all relevant medical evidence" be considered in applying the "interim" standards . . . .

19. House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. 22 (1981). New criteria were published by Labor at 20 C.F.R. Pt. 718 (1986) and apply to all claims filed after March 31, 1980.

20. H.R. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Ad. News 309.

1977 Legislative History, *supra* note 12, at 909.

In the House, Congressman Perkins, a conferee and sponsor of the legislation stated, "We do recognize in the joint explanatory statement that the Secretary of Labor may apply the interim standards to its Part C claims within the context of all relevant medical evidence." *Id.* at 929.

E. The Presumption Invocation Provisions

The Act provides benefits for total disability or death due to pneumoconiosis. 30 U.S.C. § 901(a). Pneumoconiosis is "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). If invoked, and not rebutted, the interim presumption conclusively establishes all elements of a claim. 20 C.F.R. § 727.203(a).

The presumption is available under 20 C.F.R. § 727.203(a) if the miner engaged in coal mine employment for ten or more years.[21] After this threshold is established, five alternative methods are prescribed, any one of which is sufficient to complete invocation. Invocation may be accomplished on the basis of (1) chest x-ray, biopsy or autopsy evidence, § 727.203(a)(1); (2) certain data produced on "ventilatory studies," also called pulmonary function tests ("PFTs"), § 727.203(a)(2); (3) certain data produced in "blood gas studies," § 727.203(a)(3); (4) other medical evidence including a physician's opinion establishing a totally disabling respiratory or pulmonary impairment, § 727.203(a)(4); or (5) the affidavits of a survivor of a miner or affidavits of other persons, which, in the absence of medical evidence, establish totally disabling lung disease, § 727.203(a)(5).[22]

21. In the instant case, the plurality opinion of Judge Sprouse implies but does not hold that ten years of employment must be proven, not merely alleged (Pet. App. 82a-83a).

22. This final method of invocation was not addressed by the Fourth Circuit and would have no application in the instant cases. Presumably, to be consistent, the Fourth Circuit would not permit the weighing of conflicting affidavits in the invocation phase.

Each method warrants some explanation. Chest x-ray, biopsy, and autopsy are independent methods of diagnosing pneumoconiosis. Autopsy is most definitive. Biopsy is never warranted for purposes of diagnosing pneumoconiosis alone. If a biopsy or autopsy is performed, tissue slides are available for review by consulting pathologists and disagreements among pathologists may occur. Multiple interpretations of chest x-ray films are typically present in claim records. A properly executed[22] chest film may or may not demonstrate opacities indicative of an abnormality. Opacities may reflect tissue reaction due to coal dust, other dusts, infections, smoking, or other causes.[24]

Chest film interpretations are sometimes in sharp conflict. Changes in x-ray interpretation over time may be indicative of a reversible condition, progression of disease, misreading of the film or differences of opinion. Cross-examination is accomplished by rereading of films or taking new films.

PFTs are breathing tests that measure an individual's ability to move air in or out of the lungs in the course of specified maneuvers. Two separate measurements are relied upon for invocation of the presumption.[25] The FEV_1 (one-second forced expiratory volume) is a measurement of the volume of air which can be forcibly expelled on maximum effort in one second. The MVV (maximum voluntary ventilation) is a measurement of the volume of air which can be moved in and out of the lungs with maximum effort in one minute. Both tests are highly susceptible to error. *See* 20 C.F.R. Pt. 718, App. B (1986); SSA regulations, 20 C.F.R. § 410.430 (1986). Test results do not generally establish a diagnosis but may detect a deviation from normal

23. Occasionally, a dispute is presented concerning whether the film is of adequate technical quality to permit a diagnosis. The Department of Labor has published technical quality standards at 20 C.F.R. Part 718, Appendix A (1986).

24. Pendergrass, Lainhart, Bristol, Felson & Jacobson, *Roentgenological Patterns in Lung Changes That Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. 494 (1972); Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 730 (1981).

25. A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease* 19, 67-68 (1986).

pulmonary capabilities attributable to an array of acute or chronic illness.[26]

Study results may vary from time to time as a result of acute or temporary illness, treatment of reversible illness, technician error, history of cigarette use, or variations in the effort expended by the patient.[27]

The interim presumption threshold invocation values may confer benefit of the presumption on older miners whose capabilities are within normal range. *1977 House Hearings, supra* note 13, at 274-75 (testimony of Dr. Harold I. Passes). Cross-examination is accomplished by reviewing the test record or retesting.

Blood gas studies measure dissolved gases in arterial blood and its acid-base balance (ph).[28] A single sample of blood is tested for various components including dissolved oxygen (pO_2) and carbon dioxide (pCO_2). The resultant data, if abnormal, may show a defect in the ability of the pulmonary system to oxygenate the blood and remove waste gases, or metabolic, cardiovascular, or other diseases.[29] Tests are sensitive to the altitude of the location at which the test is performed (barometric pressure), proper handling of the sample, drug use and other factors.[30] Varying results, from time to time, may be due to resolution of illness, improper testing procedures, changes in personal habits, or location of the test facility.[31] Cross-examination of blood gas test results can (with few exceptions) be accomplished only by retesting.

Invocation by "other medical evidence," § 727.203(a)(4), focuses on physician opinion evidence in the form of written reports, depositions or live testimony. The invocation provision requires the physician to document findings and provide a rationale for diagnoses or conclusions. Differences of opinion are fairly

26. *Id.* at 4-5. PFTs produce much data in addition to the FEV and MVV measurements which are of value to the diagnostician.

27. *Id.* at 3-4, 34-35, 43-44. Pneumoconiosis, if present, is irreversible. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 7.

28. *Id.* at 162.

29. *Id.* at 162, 176, 376-78.

30. *Id.* at 162, 186-87, 376-78.

31. *Id.*

common and may be explained by invalid objective test results, the physician's competence, or any of the other variables that cause experts to differ.

F. Effect of Invocation

Invocation of the interim presumption establishes prima facie entitlement. The circuits agree that invocation of the presumption permanently and irrevocably shifts the ultimate burden of persuasion to the claim defendant. *Kaiser Steel Corp.* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d 1426, 1430 (10th Cir. 1984); *Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *Alabama By-Products Corp.* v. *Killingsworth*, 733 F.2d 1511, 1514 (11th Cir. 1984); *Consolidation Coal Co.* v. *Smith*, 699 F.2d 446, 449 (8th Cir. 1983). In the Fourth Circuit, the rule applied on rebuttal requires the employer to "rule out" presumed facts. *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 123 (4th Cir. 1984).

G. Mechanics of Presumption Rebuttal

Four alternative methods of rebuttal are available. 20 C.F.R. § 727.203(b)(1)-(4) (1986). Each method prescribes an affirmative defense. But, as these provisions are applied by the courts, the presumption is extremely difficult to overcome.

The Fourth and Seventh Circuits have held that the presumption may not be rebutted even by conclusive proof that the miner suffers from no respiratory impairment at all, if he is disabled for work by non-occupational ailments. *Sykes* v. *Director, Office of Workers' Compensation Programs*, ___ F.2d ___, No. 85-1441, slip op. at 8-9 (4th Cir. Mar. 3, 1987); *Wetherill* v. *Director, Office of Workers' Compensation Programs*, ___ F.2d ___, No. 86-1053, slip op. at 5-6 (7th Cir. Feb. 25, 1987). Rebuttal is generally precluded unless it can be proven that coal dust exposure *in no part* contributes to the miner's overall non-occupationally related disability. *Amax Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 801 F.2d 958, 963 (7th Cir. 1986); *Carozza* v. *United States Steel Corp.*, 727 F.2d 74, 78 (3d Cir. 1984), or absent proof which "rules out" the possibility that dust exposure aggravated a non-occupational illness. *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d at 124 (cancer). The Third Circuit prohibits rebuttal unless "persuasive evidence" demonstrates the absence of not only medical pneumoconiosis but "legal" pneumoconiosis as well. *Pavesi* v. *Director, Office of Workers' Compensation Programs*, 758 F.2d 956, 965 (3d Cir. 1985).

While all circuits now agree that relevant rebuttal evidence must be considered, the Tenth permits rejection of an expert's opinion that a presumed fact is untrue, on the theory that such testimony, however medically correct it may be, is contrary to the purposes of the Act. *Kaiser Steel Corp.* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d at 1430. The Fourth holds that a consulting pulmonary specialist's opinion is "insufficient as a matter of law" to rebut, *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d at 125, while the Third has held that such a report may have probative value "in some circumstances." *Evosevich* v. *Consolidation Coal Co.*, 789 F.2d 1021, 1028 (3d Cir. 1986).

Within this setting, rebuttal may be accomplished, but "prescribed methods of rebuttal leave responsible coal mine operators with a heavy burden." *Kaiser Steel Corp.* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d at 1431. It is not unusual for the legal standard imposed in the evaluation of rebuttal evidence to exceed the capabilities of human biological sciences.

H. Presumption Invocation in the Instant Cases

In Stapleton's case, x-ray evidence was in conflict (Pet. App. 108a-109a). Two PFTs were discredited as invalid (Pet. App. 109a). Blood gases were above disability levels (Pet. App. 109a). Medical opinion evidence established disability due to heart disease, a back injury and other difficulties (Pet. App. 110a-113a). The ALJ invoked the presumption on the single positive

x-ray, but did not weigh it against negative interpretations (Pet. App. 113a). On a rebuttal inquiry, the ALJ weighed the negative x-rays and other relevant evidence, concluding that it established an absence of both pneumoconiosis or any disabling respiratory or pulmonary impairment. Rebuttal was, therefore, accomplished (Pet. App. 114a-116a).

On appeal, the Board affirmed on the grounds that the ALJ's rebuttal findings were supported by substantial evidence, noting harmless error in the ALJ's failure to weigh all x-ray evidence in the invocation phase (Pet. App. 104a-105a). Stapleton appealed to the Fourth Circuit.

Ray's case presented nine x-ray readings, all but one of which failed to diagnose pneumoconiosis (Pet. App. 128a-129a). Six PFTs were in the record, two of which met invocation values (Pet. App. 130a). The blood gases did not invoke (Pet. App. 131a). The medical opinion evidence was in conflict (Pet. App. 132a-133a). The ALJ weighed like-kind invocation evidence in each category and, finding that a preponderance of the evidence did not support invocation by any method, denied benefit of the presumption (Pet. App. 133a).

On appeal, the Board affirmed non-invocation as supported by substantial evidence (Pet. App. 118a). Ray appealed to the Fourth Circuit.

In Cornett's case, five x-rays were submitted, four of which were negative (Pet. App. 144a). Two PFTs were submitted, one of which would invoke (Pet. App. 145a). Three blood gases were submitted, two of which did not qualify (Pet. App. 146a). The ALJ invoked on all three bases. Rebuttal evidence was found inadequate and benefits were awarded (Pet. App. 150a).

On appeal, Mullins argued that while the ALJ considered all the invocation evidence, he did so inaccurately and did not weigh it but simply rejected negative tests and x-rays. The Board affirmed, finding the award supported by substantial evidence (Pet. App. 136a, 139a). Mullins appealed to the Fourth Circuit.

I. The Opinions Below

The Fourth Circuit, *sua sponte*, consolidated the three cases for *en banc* consideration and certified six questions to be addressed by the parties.[32] The court directed the parties to address these questions in light of panel decisions in *Hampton* v. *United States Department of Labor Benefits Review Board*, 678 F.2d 506 (4th Cir. 1982) (holding that the opinion of a physician, which is documented in part by PFTs and blood gas test results, is not competent rebuttal evidence); *Whicker* v. *United States Department of Labor Benefits Review Board*, 733 F.2d 346, 349 (4th Cir. 1984) (modifying *Hampton* to hold that such tests and opinions were probative evidence but may not "be used as the principal or exclusive" means of rebuttal); and *Consolidation Coal Co.* v. *Sanati*, 713 F.2d 480, 481-82 (4th Cir. 1983) (holding that, in the invocation phase, the claimant has the burden of proving an invocation fact by a preponderance of the evidence).

The Department of Labor intervened in this important matter. The agency argued that invocation may be accomplished only if the invocation fact alleged is proven by a preponderance of the evidence, and that all evidence relevant to any rebuttal inquiry must also be considered. The Department asked the court to accord substantial deference to its long-standing interpretation of its regulation.

A sharply divided court split into three groups producing four opinions. *Hampton*, *Whicker*, and *Sanati* were overruled (Pet. App. 4a). Varying groups in the majority held:

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32. The Fourth Circuit's Order queried as follows: Q1. Is the Part C interim presumption automatically triggered by any single piece of invoking evidence? Q2. If there is one positive x-ray and 10 negative x-rays, must the administrative law judge invoke the presumption as a matter of law? Q3. What minimum criteria such as authenticity, etc., must a positive x-ray meet to trigger the presumption? Q4. Once invoked, to what extent is non-qualifying medical evidence deemed proper rebuttal evidence? Q5. Is a negative x-ray permitted to "rebut" a positive x-ray? Q6. Are non-qualifying objective test scores permitted to rebut a positive x-ray?

1. A single positive x-ray or qualifying pulmonary function or blood gas study invokes the presumption. Comparable like-kind evidence is not weighed under § 727.203(a)(1)-(3) (Pet. App. 3a).

2. A single physician's opinion meeting the requirements of § 727.203(a)(4) invokes the presumption notwithstanding the presence of contradictory evidence (Pet. App. 3a).

3. The presumption may also be invoked under § 727.203(a)(4) on other medical evidence but, here only, invocation may be accomplished "under customary rules of evidence;" that is, "by a preponderance" (Pet. App. 3a).

4. "All relevant medical evidence" including negative x-rays and objective test results must be weighed in the rebuttal phase, limited only by the statutory prohibition against denial of a claim "on the basis of one negative chest x-ray" (Pet. App. 4a).

One majority opinion concluded that the plain language of § 727.203(a) dictated a single item invocation rule (Pet. App. 20a (Opinion of Hall, J.)); that the preponderance rule advocated by the Government and employers conflicted with the regulation and congressional intent, thereby depriving the Government's claim of deference of validity (Pet. App. 17a (opinion of Hall, J.)); and that the "statutory and regulatory scheme establishing the interim presumption supersedes the APA's" preponderance standard (Pet. App. 22a, note 8 (Opinion of Hall, J.)).

In a concurring opinion, the majority's refusal to accord deference to the agency's interpretation is justified by the belief that the Department's interpretation was a litigation position not consistently applied (Pet. App. 56a-59a (Opinion of Sprouse, J.)). A lengthy review of the legislative history documents the liberal intent of the Act, Congress's concern over proof difficulties confronted by claimants, and the participation by congressional staff in the regulatory process (Pet. App. 56a-83a (Opinion of Sprouse, J.)). This opinion concludes that the preponderance

standard advocated by the Government frustrates the intent of Congress (Pet. App. 81a-83a (Opinion of Sprouse, J.)).[33]

A second concurring opinion agrees with the conclusion that the language of § 727.203(a) and the legislative material surveyed supersedes any preponderance rule imposed by the Administrative Procedure Act ("APA"), in keeping with the APA's rule against supersedure, 5 U.S.C. § 559 (Pet. App. 93a-95a (Opinion of Widener, J.)). All three majority opinions on the invocation question expressed concern that the weighing of evidence in the invocation phase would preclude rebuttal in some circumstances, thus violating Congress's intent that the presumption not be rendered irrebuttable.

In the dissent, it is postulated that the Government's interpretation of the invocation provisions to require proof of invocation by a preponderance of the evidence is neither plainly erroneous nor inconsistent with the language of the Act or the rule and is entitled to substantial deference (Pet. App. 36a (Opinion of Powell, J.)).

SUMMARY OF ARGUMENT

Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. § 923(b), requires that "[i]n determining the validity of claims under this part, all relevant evidence shall be considered . . . where relevant . . . ." The governing regulations, § 723.203, require a claimant to "establish" and "demonstrate" that the interim presumption should be invoked. The Secretaries of Labor and of Health and Human Services have for fifteen years consistently and properly interpreted this language to require claimants to present reliable, credible evidence and to establish by a preponderance of evidence that benefit of the presumption should be conferred. This administrative interpretation of the invocation provisions is reasonable, and entitled to substantial deference.

The Administrative Procedure Act, which is incorporated into the Black Lung Benefits Act, requires that a preponderance of

33. With respect to rebuttal, the opinions of Judges Sprouse and Hall would have retained the *Whicker* standard.

evidence standard be applied to invocation of the interim presumption. The Secretary of Labor may not exempt himself from the requirements of the APA either by regulation or practice, 5 U.S.C. § 559.

Section 7(c) of the APA, 5 U.S.C. § 556(d), which applies here, was intended by Congress to prohibit agency fact-finding on the basis of unreliable, insubstantial or directly discredited evidence. It ensures the right of cross-examination to all parties in on-the-record proceedings, so that administrative decisions are made on the basis of a "full and true disclosure of the facts."

The Fourth Circuit's majority opinion effectively precludes cross-examination with respect to invocation facts and relegates to virtual irrelevancy even conclusive proof of the inaccuracy and unreliability of invocation evidence. In the context of this powerful presumption, Section 7(c), its purpose as expressed by its framers, and as interpreted in *Steadman* v. *SEC*, 450 U.S. 91, 101-02 (1981), means that in invocation, as in rebuttal, all critical facts that a party is required to establish must be proven by a preponderance of the reliable, probative and substantial evidence.

For these reasons, the majority holding of the Fourth Circuit that benefit of the presumption is conferred without regard to the truth of the matter should be reversed.

ARGUMENT

I.

THE CONSISTENT AND LONG-STANDING INTERPRETATION OF THE STATUTE AND IMPLEMENTING REGULATIONS BY THE ADMINISTERING AGENCIES TO IMPOSE A PREPONDERANCE OF THE EVIDENCE STANDARD ON BLACK LUNG CLAIMANTS SEEKING TO INVOKE THE INTERIM PRESUMPTION DESERVES SUBSTANTIAL JUDICIAL DEFERENCE

A. The Language of the Black Lung Benefits Act in View of its Legislative History Authorizes the Secretaries to Require a Preponderance of Evidence to Invoke the Interim Presumption.

The language of the Act prescribes statutory presumptions, 30 U.S.C. § 921(c)(1)-(5), but does not expressly allocate burdens of proof or persuasion, or designate the quantum of proof required to prove a fact.

Those procedural matters are prescribed for Part B (SSA) claims by incorporation by reference of Section 205 of the Social Security Act, 42 U.S.C. § 405 (30 U.S.C. § 923(b)), and for Part C (Labor) claims by incorporation by reference of sections of the Longshore Act, 33 U.S.C. §§ 901-952 (30 U.S.C. § 932(a)). The Longshore Act, in turn, incorporates by reference the provisions of the Administrative Procedure Act governing on-the-record adjudications. 5 U.S.C. § 554, incorporated into 33 U.S.C. § 919(d), incorporated into Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a).

Congress, by this complicated scheme, intended to regulate matters of proof directly or by delegation. Some rules of proof are addressed in the Act. Section 413(b), 30 U.S.C. § 923(b), prohibits the denial of a claim on a single negative x-ray, limits the authority of the Secretary of HHS to cross-examine certain positive x-rays,[34] and provides that all miners are to be given the

34. The Secretary of Labor has applied this provision to Part C claims for which the Black Lung Disability Trust Fund, as distinct from a mine operator, is liable. Congress made it clear that it had no intent

opportunity for a complete pulmonary evaluation. Similarly, § 413(b) (emphasis added) provides in part:

> In determining the validity of claims under this part, *all relevant evidence shall be considered, including, where relevant,* medical tests such as blood gas studies, x-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials.

Enacted prior to the SSA presumption, the relevant evidence provision of § 413(b) was re-enacted in 1978 by Congress with full awareness of the presumptions, and has always been construed to apply with equal force in Part B and Part C claims. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 33. *See also* 30 U.S.C. § 940 (stating that § 413(b) is applicable to Part C "to the extent appropriate").

Each word of this statute must be accorded meaning. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). Congress expressly mandated that "all relevant evidence *shall* be considered, including, *where relevant*" the precise types of medical evidence which the Fourth Circuit held shall not be considered at a critical adjudicatory stage of the claims process. 30 U.S.C. § 923(b) (1986) (emphasis added). There is no question that the excluded medical evidence is relevant. Congress said consider the evidence. The courts have historically followed this mandate. The Fourth Circuit has "repealed" this mandate. The express language of the statute compels the *meaningful* consideration of relevant medical evidence. The Fourth Circuit's holding, for practical purposes, precludes its consideration.

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to limit a mine operator's right to challenge x-ray evidence. The legislative record in this regard is surveyed in *Tobias* v. *Republic Steel Corp.*, 2 Black Lung Rep. (MB) 1-1277 (Ben. Rev. Bd. 1981).

The Fourth Circuit purports to rely on the legislative history (Pet. App. 75a-83a). However, it is a fundamental rule of statutory construction that when the statutory language is clear, the legislative history does not control. *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n.3 (1981). Even if the express statutory language is ignored, nowhere does the legislative history state that when Congress enacted the language, "all relevant evidence shall be considered," it really meant to say "all relevant evidence shall be considered *only* during the rebuttal inquiry."[35] If Congress intended this important statutory limitation, which has escaped the notice of many courts for many years, it would have expressly so stated.

What the Fourth Circuit overlooks in its survey of the legislative record is that each specific reference to the interim presumption itself emphasizes that the Secretary of Labor, in determining claims under the presumption, must consider "all relevant medical evidence." H.R. Rep. No. 864, *supra* note 20, at 12, 1978 U.S. Code Cong. & Ad. News at 309; *see also supra* at pp. 12-13. This congressional commentary, like its statutory counterpart in § 413(b), neither makes nor suggests a distinction depending upon whether the Secretary is engaged in an invocation or rebuttal inquiry.

In holding that the "all relevant evidence" language applies to rebuttal only, the Fourth Circuit majority notes the remedial purposes of the Act[36] and discusses the fallibility of x-rays and

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35. In debate over provisions which prohibit the *Government* from challenging certain x-rays submitted by a claimant, Senator Chaffee, the sponsor of amendments to this provision, stated: ". . . Oddly enough, it deprives the Government of its defenses, but it does not deprive the owner of the mine of his defenses. In those instances where there is a known mineowner who employed the claimant, and the claimant comes in for his claim, in that case, there can be a rereading, a second reading, under this act, to protect the owner of the mine. To me, it is incongruous and I just do not understand it, that we are depriving the Government of a defense that we are not depriving the owner of the mine of." 123 Cong. Rec. 24,244 (1973) (statement of Sen. Chaffee).

36. In any event, reference to the remedial purposes of a workers' compensation law, which by its nature reflects a legislatively settled compromise between employer and employee interests, is no substitute for settled principles in construing its precise terms. *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs,*

other objective tests (Pet. App. 74a-82a (Opinion of Sprouse, J.)). The specific legislative history cited does not relate to the interim presumption, but to a variety of *proposed* automatic entitlements for long-term miners.[37] In support of these proposals, legislative proof was produced to demonstrate that benefits should be paid without any regard to medical facts. H.R. Rep. No. 151, 95th Cong., 1st Sess. 5-10 (1977), *reprinted in 1977 Legislative History*, *supra* note 12, at 512-17. These proposals were not enacted, and their legislative history is irrelevant. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 105 S. Ct. 3085, 3092 (1985). Neither do the general concerns expressed in congressional debate grant "license to ignore the plain meaning" of statutory terms. *United States* v. *Lorenzetti*, 104 S. Ct. 2284, 2291 (1984).

Relying upon a law review article written by counsel for Petitioners,[38] the Fourth Circuit majority appears to have given great weight to the suggested role of congressional staff in the regulatory drafting process (Pet. App. 61a, 62a, 73a, 81a (Opinion of Sprouse, J.)). This Court has never held that the post hoc involvement of congressional staff members in the drafting of agency rules is or ought to be an authoritative source of Congress's intent. There is no public record of the events discussed in the article. The events relied upon by the court are drawn solely from the article. Such reliance is not only inappropriate but also misconstrues the article.

The reference cited states: "Another provision would have required the adjudicator to weigh all the medical test evidence to determine whether the weight of this evidence established total

461 U.S. 624, 633 (1983); *Potomac Elec. Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 282 & n.24 (1980).

37. H.R. 10760, 94th Cong., 2d Sess. § 3 (1976); H.R. 1532, 95th Cong., 2d Sess. § 3 (1977); H.R. 4544, 95th Cong., 1st Sess. § 2 (1977). Under these provisions, long-term miners would have been entitled to benefits on proof of a specified number of years of employment, without further proof of disease or disability.

38. Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869 (1981).

disability. This too was stricken by congressional command."[39] This statement was construed by the Fourth Circuit to mean that Congress, or at least the staff, disapproved weighing on invocation. The article refers to an earlier version of the presumption, provided to congressional staff, which precluded invocation unless all relevant proof of impairment (*i.e.*, PFTs, blood gases, and other proof of respiratory disability, weighed together) cumulatively established disability. It was this "all or nothing" approach to invocation which the staff disapproved in favor of the "either/or" method of invocation ultimately adopted.[40]

Neither the Act nor its legislative history lends even one word of express support to the "any evidence" invocation rule adopted by the court below. The express language and necessary implications therefrom require the weighing of all relevant evidence at this critical point in the claims proceeding. Common sense also dictates such a result.

B. The Express Language of the Interim Presumption Requires a Weighing of Evidence in the Invocation Phase.

The plain language of the presumption, requires the black lung adjudicator to weigh like-kind evidence in the invocation inquiry.

The title of the invocation paragraph, § 727.203(a), is "*Establishing interim presumption.*" Each invocation clause, respectively, permits invocation if a chest x-ray, biopsy, or autopsy "*establishes* the existence of pneumoconiosis," or PFTs "*establish* the presence of a chronic respiratory or pulmonary disease," or blood gases "*demonstrate* the presence of an impairment," or other evidence "*establishes* the presence of a totally disabling respiratory or pulmonary impairment." (Emphasis added.)[41] As

39. *Id.* at 897 n.138.

40. Later in the article, it is noted that "it has been established that a claimant . . . bears the burden of proving the facts necessary to invoke the presumption by a preponderance of the credible evidence." *Id.* at 903; *see also id.* at 906.

41. Similarly, the provisions of the rule which govern the rebuttal phase of the claims procedure also require defendant to "establish" the rebuttal prerequisites. § 727.203(b)(1)-(4).

the dictionary definition of "establish" equates the term with "prove," each circuit court which has defined "establish" within the context of the interim presumption has held that "establish" means "to prove by a preponderance of evidence." *Alabama By-Products Corp.* v. *Killingsworth*, 733 F.2d at 1514. *Accord Kaiser Steel Corp.* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d at 1430; *Gibas* v. *Saginaw Mining Co.*, 748 F.2d at 1120; *see also Amax Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 772 F.2d 304 (7th Cir. 1985). Indeed, both the Third and the Fourth Circuits, in interpreting the SSA x-ray invocation clause, 20 C.F.R. § 410.490(b)(1)(i), which is identical to that employed by Labor, 20 C.F.R. § 727.203(a)(1), concluded that the obligation to "establish" invocation means to prove by a preponderance. *Gober* v. *Matthews*, 574 F.2d 772, 775 (3d Cir. 1978); *Sharpless* v. *Califano*, 585 F.2d 664, 667 (4th Cir. 1978). In an opinion concurring in part and dissenting in part in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 51, Mr. Justice Stewart finds similar meaning in the terms "establish" and "demonstrate" as used in the statutory presumption at 30 U.S.C. § 921(c)(4).

If, as a matter of construction, a repetitious word usage is presumed to have the same meaning in all subsections of a statute, *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. at 633, it surely follows that the repeated use of the key word "establish" in this rule compels a consistent meaning throughout. The Fourth Circuit finds different meanings solely because the court says they differ (Pet. App. 22a note 8).

Judicial gloss aside, how does the plain language of the rule demonstrate congressional or agency intent that evidence which may be totally false *must* establish a critical presumption? It does not. Yet the majority below gives possibly false evidence absolute judicial protection.

The absurdity of that holding has led to predictably absurd results. In *Haynes* v. *Jewell Ridge Coal Corp.*, 790 F.2d 1113, 1114 (4th Cir. 1986), the Court of Appeals required invocation

as a matter of law on a single x-ray film despite the fact that six highly qualified experts interpreted the same film as negative for disease. In *Lagamba* v. *Consolidation Coal Co.*, 787 F.2d 172, 173 (4th Cir. 1986), the court found invocation as a matter of law on a positive x-ray in the face of a scientifically conclusive autopsy report ruling out pneumoconiosis. The x-ray reading was, by this proof, incontrovertibly wrong.[42] It defies logic to suggest that the substantial benefit of this presumption is properly conferred on the basis of directly discredited and unreliable proof. It is highly improbable that Congress intended to mandate this result. The Fourth Circuit's interpretation, producing so unreasonable a result, should not be favored. *See American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982).

Other language of the rule also refutes the result below. The introductory paragraph to the rebuttal section provides: "In adjudicating a claim under this *subpart*, all relevant medical evidence shall be considered." 20 C.F.R. § 727.203(b) (1986) (Pet. App. 64a). (Emphasis added.) The word "subpart" is defined at 1 C.F.R. § 21.9(b) (1986) as a device "to group related sections in a part." All of § 727.203, the interim presumption, is within *subpart* C of Part 727.[43] Therefore, the rule expressly requires that "all relevant evidence shall be considered," wherever it may be relevant in the entire *subpart*.

The Court of Appeals majority focused on the singular reference to "a x-ray," and the opinion of "a physician" to conclude that only one such item supports invocation (Pet. App. 20a, 66a-67a). With respect to the plural usage in the case of PFTs and blood gases, the majority reasons that two PFT maneuvers are

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42. Section 413(b), 30 U.S.C. § 923(b), provides in part: "Unless the Secretary has good cause to believe that an autopsy report is not accurate, or that the condition of the miner is being fraudulently misrepresented, the Secretary shall accept such autopsy report concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis."

43. Subpart C contains eligibility criteria, including other presumptions, in addition to the interim presumption. 20 C.F.R. §§ 727.204-727.205 (1986).

required and exercise and resting blood gases might be conducted,[44] and in this light, the plural simply refers to the set of tests conducted (Pet. App. 20a-21a).

It has always been the case that "a" study, testing sequence or opinion may constitute substantial evidence in support of invocation. Corroborating evidence is not required. But by the same token, the provisions do not say "any" evidence invokes. The regulations provide that evidence which "establishes" the invocation fact is required. Thus, it is only by construing words in isolation, rather than reading the entire provision as a whole, which permits the Fourth Circuit's "plain language" conclusion that any positive invoking evidence, however false, is totally shielded from the truth in the invocation phase.[45]

The Fourth Circuit majority also focused on the relationship between the invocation and rebuttal provisions (Pet. App. 21a, 68a-73a). In particular, the majority asserts that weighing the evidence on invocation may render some of the rebuttal provisions unavailable, thus undermining Congress's intent that the presumption be made rebuttable (Pet. App. 21a, 68a).[46]

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44. This reasoning does not hold for blood gases, since either gases at rest or after exercise could invoke by any theory. Two separate studies are not required.

45. In the opinion of Judge Widener (Pet. App. 158a-163a), controlling significance is placed upon commentary published with the presumption in the Federal Register. While the commentary is not part of the rule and cannot serve to amend it, the import of this material is plainly misconstrued. In responding to comments objecting to the consideration of all relevant evidence (Pet. App. 160a), the Department posits a simple example to demonstrate, not that relevant evidence is ignored on invocation, but that all relevant rebuttal evidence is considered on rebuttal. There is nothing, in context, in this commentary, which provides that a single item of invocation evidence *always* establishes invocation, and, in fact, the statement is not addressed to any invocation issue. 43 Fed. Reg., 36,826 (1978).

46. Such logic stands reason on its head. Congress in attempting to create a complex but fair administrative process to compensate deserving black lung claimants as promptly as possible was well aware of (1) the hundreds of thousands of potential claimants, (2) the billions of dollars required to fund and operate the program, and (3) the administrative monolith it was creating. Surely against this background, Congress did not intend to preclude or mandate deferral of the search for the truth until later in the process, lengthening the proceedings and increasing the cost.

But this feature of the presumption's operation hardly seems so important. It is clear that Congress intended rebuttability, but neither the Act, nor its history, nor the rule mandate that consideration of all relevant evidence is limited to rebuttal. The plain meaning of the words used by Congress is much to the contrary, suggesting no general or specific limitation on the consideration of conflicting evidence, which is traditionally weighed to resolve the conflict wherever it appears. The number of methods of rebuttal available was of no special concern.[47]

The Fourth Circuit majority has concluded that Congress intended invocation of the interim presumption without the claimant having to "establish" anything. While some members of Congress would have preferred this result and unsuccessfully proposed legislation to achieve it, *see supra* note 11, the fact remains that these proposals were defeated and the Act and regulations refute that such result was intended by Congress.

Where invocation by a preponderance is required, as has historically been the case, invocation still benefits huge numbers of legitimate claimants by presuming facts in which there is often

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47. An important point overlooked by the Fourth Circuit is that, while the SSA version could only be invoked on x-ray and PFT evidence, Labor adds three additional methods of invocation and two additional methods of rebuttal. Congress neither directed this result nor addressed such enlargement in any way. What Labor did, with respect to (a)(3) (blood gas), (a)(4) (medical opinion) and (a)(5) (claimant affidavit) invocation and the two new rebuttal methods (§ 727.203(b)(3)-(4)) is to simply replicate the statutory presumption of 30 U.S.C. § 921(c)(4) within the interim presumption, while reducing the years of employment required for invocation from 15 to 10. In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 35-37, this Court was troubled with the invocation/rebuttal dynamics of the statutory provision to the extent that it might be construed to limit rebuttal, and held that it did not. Justices Stewart and Rehnquist, dissenting in part, construed the provision to permit invocation only if fact A (total disability) was *proven*, and rebuttal if fact B (no occupational causation) or fact C (no disease) was *proven*. 428 U.S. at 51. This dissent has been the model for the application of the presumption since *Usery*. *See e.g.*, *United States Steel Corp.* v. *Gray*, 588 F.2d 1022, 1027 (5th Cir. 1978). Given the similarity between the statutory presumption and the new portions of the interim presumption, one would assume that the Secretary intended the regulatory presumption to operate like the statutory one.

little or no connection between the fact proven and those presumed. *See supra* pp. 10-11, 15. *Compare NLRB* v. *Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979) (administrative presumption must rest on sound factual connection between proved and inferred facts); *see also Developments in the Law: Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1642 (1986). Rebuttal remains a difficult road, *see supra* pp. 16-17. Fair application of the presumption consistent with all its words clearly promotes the remedial purpose of the Act.

C. In This Highly Technical Field, the Agencies' Interpretations are Plainly Controlling.

This Court has consistently held that, in construing agency regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965) (quoting *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945)). If a rule is ambiguous, it is of little moment that differences of opinion concerning its meaning exist. If the administering agency's interpretation is a reasonable one, the agency's construction controls. *United States* v. *Larionoff*, 431 U.S. 862, 872 (1977); *see also Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 104 S. Ct. 2472, 2480 (1984).

Only when the administrator's view conflicts with the plain language of the Act, or clearly frustrates the statutory mandate, does it become proper for the courts to disregard an agency's interpretation of its own rule. *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981); *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978).

All other fundamental principles of interpretation support the agencies' interpretations over that of the Fourth Circuit majority. A long-standing, consistent interpretation adds weight to the agency's views, *United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 719 (1975), especially if the agency participated in the drafting of the act in question. *See Miller* v. *Youakim*, 440 U.S. 125, 144 (1979). The agreement of two agencies on the meaning espoused also adds weight. *Cf. General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 144-45 (1976). Where the matters regulated are technically complex, requiring an application of agency expertise, deference is all the more appropriate. *Chemical Mfrs. Ass'n* v. *Natural Resources Defense Council*, 105 S. Ct. 1102, 1108 (1985). Where Congress has considered and ratified long-standing agency views in a controversial area, the presumption in favor of the agency's views is most strong. *United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979).

Under this traditional analysis, the case for according deference to the Department of Labor's interpretation is overwhelming.

The language of the Act supports the Secretary's view. The legislative record supports the Secretary's preference for a preponderance rule. *See supra* pp. 12-13, 24.

What is most compelling is the consistent and unwavering fifteen-year construction of the invocation provisions of the interim presumption by multiple Secretaries of HHS and Labor, all of whom have insisted upon a weighing of all relevant evidence in the invocation phase.[48] All have consistently required proof of each pertinent fact by a preponderance of the evidence as a prerequisite to invocation.

SSA's rule (Pet. App. 163a-166a) and Labor's rule employ identical language for x-ray and PFT invocation. Prior to enactment of the 1977 amendments (which required Labor to apply the presumption), SSA weighed the evidence before invocation,

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48. The Benefits Review Board has always required proof by a preponderance to establish invocation on x-ray, PFT and blood gas evidence. *Strako* v. *Zeigler Coal Co.*, 3 Black Lung Rep. (MB) 1-136 (Ben. Rev. Bd. 1981) (PFTs); *Lessar* v. *C. F. & I. Steel Corp.*, 3 Black Lung Rep. (MB) 1-63 (Ben. Rev. Bd. 1981) (blood gases); *Elkins* v. *Beth-Elkhorn Corp.*, 2 Black Lung Rep. (MB) 1-683 (Ben. Rev. Bd. 1979) (x-rays). For a time, the Board permitted invocation by a single medical opinion, requiring the weighing of contrary opinions on rebuttal, but the Board overruled itself on this point in favor of weighing. *Meadows* v. *Westmoreland Coal Co.*, 6 Black Lung Rep. (MB) 1-773 (Ben. Rev. Bd. 1984). The Board's views are not entitled to judicial deference. *Potomac Elec. Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. at 278 n.18.

and invoked the presumption only upon a finding that the evidence supporting invocation preponderated.[49]

The pre-1977 amendment position of SSA is most significant because, had Congress disagreed with the SSA's consistent position, Congress had ample opportunity to make clear its disagreement in the 1977 amendments. It did not, and SSA's weighing of the evidence in the invocation phase has continued without interruption to this day.[50]

Labor, of course, always advocated and applied a preponderance rule, *see, e.g., Markus* v. *Old Ben Coal Co.*, 712 F.2d 322 (7th Cir. 1983), and the matter was considered so well settled that it rarely arose in claims litigation. In *Consolidation Coal Co.* v. *Sanati*, 713 F.2d 480 (4th Cir. 1983), the Board's refusal to apply a preponderance standard on medical opinion invocation was challenged and overruled by the Fourth Circuit at the urging of the Department.

Congress's response to the actions of the administering agencies is significant. *Commodity Futures Trading Comm'n* v. *Schor*, 106 S. Ct. 3245, 3254-55 (1986). Congress has twice engaged in a comprehensive review of benefit eligibility criteria

49. A sampling of cases in which evidence was weighed and invocation denied include: *Hill* v. *Weinberger*, 430 F. Supp. 332, 355 (E.D. Tenn. 1976), *aff'd*, 592 F.2d 341, 344-346 (6th Cir. 1979); *Petrock* v. *Califano*, 444 F. Supp. 872, 875 (E.D. Pa. 1977); *Stefanowicz* v. *Mathews*, 443 F. Supp. 109, 111 (E.D. Pa. 1977); *Owens* v. *Mathews*, 435 F. Supp. 200 (N.D. Ind. 1977); *Welsh* v. *Weinberger*, 407 F. Supp. 1043, 1045-46 (D. Md. 1975); *Ward* v. *Mathews*, 403 F. Supp. 95, 98 (E.D. Tenn. 1975); *Zirkle* v. *Weinberger*, 401 F. Supp. 945 (N.D. W. Va. 1975); *Blackmon* v. *Weinberger*, 400 F. Supp. 1282, 1287 (E.D. Okla. 1975); *Baker* v. *Secretary of HEW*, 383 F. Supp. 1095, 1099 (W.D. Va. 1974).

50. *See, e.g., Couch* v. *Secretary of HHS*, 774 F.2d 163, 168 (6th Cir. 1985); *Lawson* v. *Secretary of HHS*, 688 F.2d 436 (6th Cir. 1982); *Souch* v. *Califano*, 599 F.2d 577, 581 (4th Cir. 1979); *Vintson* v. *Califano*, 592 F.2d 1353, 1358 (5th Cir. 1979); *Sharpless* v. *Califano*, 585 F.2d at 667 (holding under the SSA interim rule "we know of nothing in the Act, or in the 1972 amendments, or in their legislative history, to indicate that this fact [x-ray invocation] is not required to be proved by a preponderance of the evidence as is every other fact which is not presumed"); *Gober* v. *Matthews*, 574 F.2d at 775. Curiously, neither the Fourth nor the Third Circuits cited either *Sharpless* or *Gober* in adopting a different rule for Part C claims.

since adoptio of the SSA presumption. As noted, Congress surely was aware of SSA's invocation rule during the course of deliberations on the Black Lung Benefits Reform Act of 1977, 92 Stat. 95. Many of SSA's claim procedures and criteria were criticized, but the public record on the weighing of invocation evidence is remarkably silent. To the extent that matters of proof were discussed, it is fully apparent that Congress was concerned that all relevant evidence was not being properly considered, and it expressly directed the Secretary of Labor to ensure that all relevant evidence would be considered without limitation as to where or how. H.R. Rep. No. 864, *supra* note 20, at 12, 1978 U.S. Code Cong. & Ad. News at 309. The conferees directed the Secretary of Labor to determine how competing concerns raised in the interim presumption controversy were to be resolved, by developing standards to be "published in the Federal Register." *Id.*

That is what the Secretary did. When Congress returned to the eligibility portions of the Act in 1980-81, it reached the conclusion that the provisions then in use were too generous and scientifically invalid. Thus, many of the 1972 and 1977 amendments liberalizing eligibility rules were repealed. Black Lung Benefits Amendments of 1981, §§ 202, 203, 95 Stat. 1643-44. The interim presumption was repealed for new claims by regulation in 1980,[51] 20 C.F.R. Part 718 (1986), without comment by the Congress. This history confirms congressional approval and acceptance of the Labor Department's interpretation requiring a pre-invocation weighing and application of a preponderance standard. *See Red Lion Broadcasting, Inc.* v. *FCC*, 395 U.S. 367, 381 (1969) (discussing implied congressional ratification of administrative construction).

Nor is the agency's construction of its rule unreasonable. No sense of reason is offended by requiring claimants to produce reliable and probative evidence to invoke the presumption.

51. Thousands of interim presumption claims remain to be adjudicated. *See Petition for a Writ of Certiorari* filed herein at 16, 18 (August 29, 1986).

Since the interim presumption involves the consideration of technically complex scientific evidence, specialized agency expertise was employed in the rulemaking process to ensure that the mechanism by which benefit of the presumption was to be conferred had *some* supportable scientific basis and credibility. The presumption is not simply a rule of proof, but a rule of proof which distributes scientific or medical probabilities. As such, deference to the agency's interpretation is all the more warranted. *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 134 & n.25 (1977).

Two agencies, not one, have consistently required a weighing of pre-invocation evidence under provisions which are largely identical and clearly *in pari materia*. Neither agency's interpretation has changed in the course of fifteen years. Both interpretations were virtually contemporaneous with enactment of the enabling legislation, and both agencies participated very substantially in the legislative drafting process.

There simply is no good reason to strip the Secretary of Labor of his well-exercised discretion in promulgating and applying the rule at issue in this case. His judgment is entitled to substantial deference. The Fourth Circuit's search for a good reason to support a contrary conclusion is inaccurate, shortsighted, unpersuasive and wrong.[52]

52. In denying petitions for rehearing filed by the employer and the Department in *Revak* v. *National Mines Corp.*, No. 86-3211, op. sur denial of panel rehearing at 3 (3d Cir. Mar. 6, 1987), the Third Circuit concedes that: "Our discussion of agency deference . . . may have been off the mark." "In any event, the Supreme Court has granted certiorari in *Stapleton* and will determine the proper interpretation of the regulation." *Id.* at 5.

II.

THE ADMINISTRATIVE PROCEDURE ACT REQUIRES A CLAIMANT TO PROVE AN INVOCATION FACT BY A PREPONDERANCE OF THE EVIDENCE

A. The APA Applies in Labor Department Black Lung Claims.

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a), incorporates by reference Section 19 of the Longshore Act, 33 U.S.C. § 919. Paragraph (d) of § 19 provides: "Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of title 5 [of the United States Code]. . . ."

Section 554 of Title 5, 5 U.S.C. § 554, sets forth the rules of procedure and procedural rights which apply in on-the-record hearings subject to the Administrative Procedure Act, 5 U.S.C. §§ 551-559. The general applicability of the APA in black lung claim proceedings is not in dispute. *Director, Office of Workers' Compensation Programs* v. *Eastern Coal Corp.*, 561 F.2d 632 (6th Cir. 1977); *Director, Office of Workers' Compensation Programs* v. *Alabama By-Products Corp.*, 560 F.2d 710 (5th Cir. 1977); *Krolick Contracting Corp.* v. *Benefits Review Bd.*, 558 F.2d 685 (3d Cir. 1977); *Director, Office of Workers' Compensation Programs* v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977).

B. Application of the APA is Neither Superseded by Nor Subject to the Discretion of the Secretary.

Section 12 of the APA, 5 U.S.C. § 559 (Pet. App. 167a), provides in relevant part: "Subsequent statute may not be held to supersede or modify this subchapter . . . , except to the extent that it does so expressly." Under § 12, the APA is the functional equivalent of a procedural constitution for administrative law practice. This law was intended to set "minimum requirements" for hearings; agencies are to operate " 'across the board' in

accordance with its terms." H.R. Rep. No. 1280, 79th Cong., 2d Sess., *reprinted in* 1946 U.S. Code Cong. Serv. 1205. The APA's sponsor, Senator McCarren, termed the Act's provisions "minimum basic essentials, framed out of long consideration and in the light of . . . comprehensive studies." 92 Cong. Rec. 2148, 2151 (1946). Further, he said, "it will be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection. . . ." *Id.* at 2159.

This Court repeatedly has refused to permit supersedure of any APA rule by implication, *Rusk* v. *Cort*, 369 U.S. 367, 379 (1962); legislative history, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-52 (1950); agency regulation, *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51-53 (1955); or any other method short of direct, specific statutory language which expressly contradicts APA requirements. APA exemptions "are not lightly to be presumed," *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1958); "unless made by clear language or supersedure the expanded mode of review granted by that Act cannot be modified." *Brownell* v. *We Shung*, 352 U.S. 180, 185 (1956).

The courts of appeals have consistently applied these principles. As one court recently noted, "surely the import of the § 559 instruction is that Congress's *intent to make a substantive change* be clear." *Association of Data Processing Serv. Orgs.* v. *Board of Governors of Fed'l Reserve Sys.*, 745 F.2d 677, 686 (D.C. Cir. 1984) (emphasis in original). *See also Steere Tank Lines, Inc.* v. *ICC*, 714 F.2d 1300, 1310 (5th Cir. 1983) (holding an express reference to the standard of proof insufficient to meet § 559's supersedure requirements). Express supersedure should be narrowly construed. *Church of Scientology of California* v. *IRS*, 792 F.2d 146, 149 n.2 (D.C. Cir. 1986).

The Fourth Circuit majority in this case recognizes that a preponderance standard ordinarily applies to invocation facts (Pet. App. 22a, note 8, 93a), but holds that the language of the interim presumption itself, its legislative history, and the apparent actions of congressional staff members, are legally sufficient to supersede the APA standard of proof.

The Fourth Circuit majority is incorrect. Neither the Black Lung Act nor its history expressly prescribes that the burden or quantum of proof to be carried for invocation of the interim presumption is less than that required by the APA. Silence is far short of express supersedure. Congressional rhetoric not express in legislation also falls far short. The Fourth Circuit majority's supersedure by implication violates express provisions of the APA and is plainly inconsistent with the decisions of this Court.

The Government takes the position in this case that § 422(a) of the Black Lung Act, 30 U.S.C. § 932(a), contains an express exemption from the APA, even though it was not actually employed in this instance. *Brief for the Federal Respondent*, at 21 n.20.[53]

The section relied upon by the Government provides that incorporated Longshore Act sections shall apply "except as otherwise provided in this subsection or by regulations of the Secretary . . . ." 30 U.S.C. § 932(a). This special regulatory authority is granted to the Secretary to permit adjustment of the Longshore Act's claim timing sequences and payment procedures to the special needs of black lung claims. *Patton* v. *Director, Office of Workers' Compensation Programs*, 763 F.2d 553, 559 (3d Cir. 1985); *Director, Office of Workers' Compensation Programs* v. *Bivens*, 757 F.2d 781 (6th Cir. 1985); *U.S. Pipe & Foundry* v. *Webb*, 595 F.2d 264, 273 (5th Cir. 1979). It does not give the Secretary authority to disengage the APA by regulation.

The circuits repeatedly and persistently have refused to construe § 422(a) to authorize the Secretary to diminish basic procedural rights conferred on black lung claim parties by the Longshore Act or the APA. For example, when the Department

53. This position is at variance with that advanced by the Department below and in the Third Circuit. In *Revak* and *Stapleton*, government counsel argued that the APA required application of a preponderance of the evidence standard to support a finding of invocation fact. Brief of the Director, OWCP at 10 n.4, *Revak* v. *National Mines Corp.*, 808 F.2d 997 (3d Cir. 1986) (No. 86-3211).

of Labor cited § 422(a) as authority to appoint persons not qualified as administrative law judges to conduct black lung hearings,[54] the circuits uniformly rejected that purported reliance. *Director, Office of Workers' Compensation Programs* v. *Alabama By-Products Corp.*, 560 F.2d at 718; *Director, Office of Workers' Compensation Programs* v. *Peabody Coal Co.*, 554 F.2d at 342 (holding that "the Secretary simply cannot be understood to possess authority to supercede [sic] the provisions of the APA as he sees fit"); *see also Director, Office of Workers' Compensation Programs* v. *Eastern Coal Co.*, 561 F.2d at 652. Other important rights conferred by the Longshore Act have been held immune from the Secretary's § 422(a) authority. *See, e.g., Warner Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 804 F.2d 346 (6th Cir. 1986) (notice of claim); *Trent Coal, Inc.* v. *Day*, 739 F.2d 116, 118 (3d Cir. 1984) (right to appeal).

There is, in sum, no indication that the Secretary's authority to conform Longshore Act procedures to the special needs of black lung claims administration also licenses the Secretary to deprive claim parties of APA protections. So broad a reading of § 422(a) violates this Court's rulings governing APA supersedure, and is inconsistent with the meaning and purpose of 5 U.S.C. § 559. The APA on-the-record hearing rules expressly apply in Black Lung Act claims in accordance with the terms of both enactments.

54. Congress recognized that § 422(a) did not authorize the Secretary to accomplish supersedure of the APA. Therefore it enacted express statutory authority to permit this usage in sequential appropriations acts and by joint resolution. *See, e.g., Director, Office of Workers' Compensation Programs* v. *Alabama By-Products Corp.*, 560 F.2d at 718; H.R.J. Res. 1118, 94th Cong., 2d Sess. (1976), *reprinted in 1977 Legislative History, supra* note 12, at 404.

C. Section 7(c) of the APA Requires Application of a Preponderance of the Evidence Standard to Interim Presumption Invocation Facts.

Section 7(c) of the APA, 5 U.S.C. § 556(d), applies to proceedings conducted in accordance with 5 U.S.C. §§ 554, 554(c)(2). Section 7(c) provides in pertinent part:

> Except as is otherwise provided by statute, the proponent of a rule or order has the burden of proof . . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence . . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts . . . .

The APA defines "rule," "order" or "sanction" to include "the whole or a part of" an agency action. 5 U.S.C. § 551(4), (6), (10). A black lung benefits award is a "sanction" within the meaning of 5 U.S.C. § 551(10)(E). Congressional intent to impose a sanction by presumption, without consideration of available relevant evidence should not be lightly inferred.

Presumptions are powerful vehicles of congressional and agency policy. "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive. . . ." *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976).

The interim presumption is an exceptional representative of its class. Invocation *is* entitlement to black lung benefits in huge numbers of cases. Invocation makes a prima facie case which, if unrebutted, establishes liability. Even if invocation by a preponderance is required, in practice, a prima facie case is very easy to make and quite difficult to rebut. Invocation *permanently* shifts the burden of persuasion. *See supra* p. 16. Rebuttal in most instances requires proof of a negative in the form of an affirmative defense. Invocation and rebuttal facts differ significantly, and proof which is relevant and significant in invocation is rarely adequate to prove a fact in rebuttal. The Fourth Circuit's new

rule permits an outcome determinative presumption to be invoked, even if based on patently invalid or false evidence. Congress incorporated the protections of the APA into the administrative process to prevent such a result. It is well settled that Congress has the power to prescribe rules of evidence and standards of proof. *Vance* v. *Terrazas*, 444 U.S. 252, 265-66 (1980). When Congress has not done so expressly in a matter subject to APA adjudication, the APA rules of proof apply. *Steadman* v. *SEC*, 450 U.S. 91, 101 (1981). In *Steadman*, this Court held that the imposition of a sanction in an APA proceeding must rest upon a preponderance of the reliable, probative evidence, 450 U.S. at 101-04. Section 7(c) emphasizes the intent of the APA that imposition of sanctions be based upon evidence of adequate quality and quantity to support a conclusion. *Id.* *Steadman* strongly suggests that *all* critical determinations in an APA-governed decision must be resolved on a preponderance of reliable evidence. In black lung litigation, there is no determination more critical than invocation of the interim presumption.

The legislative history of the APA is highly critical of agency action based on a mere scintilla of evidence or unreliable evidence. *See Steadman* v. *SEC*, 450 U.S. at 101-02. One congressional report notes: "No agency is authorized to stand mute and automatically disbelieve credible evidence." S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* Senate Comm. on the Judiciary, *Legislative History of the Administrative Procedure Act*, 79th Cong., 2d Sess. 185, 208. "The basic provision respecting evidence in Section 7(c)—requiring that any agency action must be supported by plainly 'relevant, reliable, and probative evidence'—will require full compliance by agencies and diligent enforcement by reviewing courts. Should that language prove insufficient to fix and maintain the standards of proof, supplemental legislation will become necessary."[55] *Id.* at 216.

55. The Fourth Circuit's holding largely ousts judicial review of invocation fact-finding. The circuits, under 33 U.S.C. § 921(c) as incorporated by reference into 30 U.S.C. § 932(a), are obligated to review claims decisions to determine whether they are supported by substantial evidence. If, with respect to invocation, the decision need not be supported by substantial evidence either in a trial sense or appellate sense, effective review of the invocation process is precluded, and the right of review granted by 33 U.S.C. § 921(c) is diminished.

56. The Interstate Commerce Commission in *Port Norris Express Co.* v. *ICC*, 697 F.2d 497, 502-03 (3d Cir. 1982), argued that an applicant for a certificate to operate need only present "some evidence"

Senator McCarren stated that the drafters "laid down the rule that the administrative agencies must not make a finding which impinges on an individual unless there is behind such finding probative evidence to sustain it . . . . We tried as best we could to establish a guide for administrative groups so that they would apply the rule in such a way that there would be substantial probative evidence behind their findings, and so that they could say, 'We are not afraid to have our findings reviewed by a court.'" *Id.* at 321 (proceedings in the Senate, March 12, 1946 (statement of Senator McCarren)). Further, "[t]he agency must examine and consider the whole of the evidence relevant to any issue and, secondly, . . . it must be decided in accordance with the evidence." *Id.* at 365 (proceedings in the House of Representatives, May 24, 1946 (statement of Rep. Walter)). It seems clear that the Congress was determined to end the practice of agency fact-finding on unreliable or insubstantial evidence. The court below has not only revived but endorsed that practice.

Typically, a presumption which shifts the ultimate burden of persuasion imposes an intermediate burden on the party seeking its benefit to prove invocation by a preponderance of the evidence. *See, e.g., NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 403 (1983). Even if the presumption does not shift the ultimate burden of persuasion, the plaintiff's burden on invocation is met by establishing a prima facie case by a preponderance, which may then be defeated by defendant's production of credible rebuttal evidence. *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 254-55 (1981). A prima facie case "must be supported by evidence." *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935). Where a presumption shifts the ultimate burden to the defendant to establish an affirmative defense, the establishment of a prima facie case necessarily requires a pre-invocation weighing of the evidence and a resolution of conflicts." *See Texas*

Dep't of Community Affairs v. *Burdine*, 450 U.S. at 253-54 & n.7. *Cf. U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, Office of Workers' Compensation Programs*, 455 U.S. 608, 613 (1982) (requiring claimant to allege and prove all essential elements of rebuttable presumption of coverage of injury under Longshoremen's and Harbor Workers' Compensation Act). To give benefit of such a presumption on false evidence, then shift the inquiry to affirmative defenses, simply is not consistent with the language or purpose of the APA or any sense of fair play in the conduct of litigation. Such an approach is clearly inconsistent with a statute which demands a "full and true disclosure of the facts."

The Secretary of Labor's conclusion that an intermediate preponderance burden must be carried for invocation of the interim presumption may have been reached independently, but it is also compelled by 5 U.S.C. § 556(d).

Section 7(c) of the APA was enacted to prevent agency reliance on unreliable evidence in the course of critical fact-finding no matter where in the litigation those facts were found, so long as the facts are relevant to the disposition of the matter. Since invocation of the interim presumption is so frequently dispositive, facts supporting invocation are likely to be the most relevant. If those facts need not be supported by substantial evidence as the term is defined in *Steadman*, then the rights to a fair hearing the APA is designed to secure for all parties are substantially diminished for black lung claim defendants. This would be less prejudicial if the rebuttal inquiry permitted a second specific look at the weight of invocation evidence, but it most often does not. On rebuttal, the inquiry shifts to the presence or absence of a broader set of defined facts. In this inquiry, proof of the complete invalidity of invoking evidence may not be adequate to rebut, since mere

---

of public need to establish a prima facie case. The court rejected this argument, holding instead that the APA required "substantial evidence" in order to support such a finding. The court relied upon the appellate standard of review and not 5 U.S.C. § 556(d) for this holding.

unreliability, inaccuracy or falsity of claimant's invoking evidence does not necessarily establish rebuttal facts by a preponderance.

In *IT&T Corp.* v. *Local 134, IBEW*, 419 U.S. 428, 438-39 (1975), this Court observed that the generalities of the APA are best applied in consideration of the setting presented. Congress surely intended that the provisions of 5 U.S.C. § 556(d) would prohibit the consequences mandated by the court below and it made this important protection applicable in a black lung interim presumption adjudication. Section 7(c), in light of 5 U.S.C. § 551(10), should be construed to require a black lung claimant to carry the burden of proving invocation of the presumption by a preponderance of the evidence.[57] We urge the Court to so hold.

---

57. In any event, the Secretary of Labor's interpretation of the invocation provisions to impose a preponderance burden, is certainly consistent with the APA rules of proof, and that interpretation gains still further claim to deference by virtue of this fact. *See NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. at 403.

CONCLUSION

The judgment of the Fourth Circuit, insofar as it holds that black lung claimants need not prove invocation of the black lung interim presumption by a preponderance of the evidence, should be reversed. The claims of Ray and Cornett should be remanded for consideration in keeping with this Court's opinion. Stapleton's claim is moot.

Respectfully submitted,

.....

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March 19, 1987

[illegible]

[illegible]

[illegible] Court of the United States

OCTOBER TERM, 1987

MULLINS COAL COMPANY,
INCORPORATED OF VIRGINIA
[illegible]D REPUBLIC INSURANCE COMPANY
[illegible]JEWELL RIDGE COAL CORPORATION,
Petitioner,

v.

[illegible] DIRECTOR, OFFICE WORKERS'
[illegible]SATION PROGRAMS,
[illegible] DEPARTMENT OF LABOR,
[illegible], LUKE R. RAY,
[illegible] R. STAPLETON and
[illegible]LAND COAL COMPANY,
Respondent.

[illegible] TO THE UNITED STATES
[illegible] FOR THE FOURTH CIRCUIT

[illegible] COAL COMPANY'S [illegible] SUPPORT OF PETITIONER

DAVI[illegible]ETTE
[illegible], HOLT & [illegible]
[illegible]
[illegible]
[illegible], West Virginia [illegible]
[illegible]

[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-327

MULLINS COAL COMPANY,
INCORPORATED OF VIRGINIA
OLD REPUBLIC INSURANCE COMPANY
and JEWELL RIDGE COAL CORPORATION,
Petitioner,

v.

THE DIRECTOR, OFFICE WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
GLENN CORNETT, LUKE R. RAY,
GERALD R. STAPLETON and
WESTMORELAND COAL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT WESTMORELAND COAL COMPANY'S BRIEF IN SUPPORT OF PETITIONER

I.

STATEMENT OF THE CASE

This matter arises under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 which provides for the payment of compensation benefits where it is established that a

miner's total disability or death was due to coal workers' pneumoconiosis arising out of coal mine employment. [1] The last coal mine operator which employed a coal miner may be liable for the payment of benefits to a claimant where the claim was filed after June 30, 1973. (30 U.S.C. §§ 925(a), 932(b), 933) Claims filed prior to July 1, 1973 were filed with the Social Security Administration (30 U.S.C. §§ 921-924) Those claims filed after June 30, 1973 in which the last coal mine employment occurred prior to January 1, 1970 or in which no coal mine operator can be identified and held responsible, are paid by the Black Lung Disability Trust Fund. (30 U.S.C. § 934) This Trust Fund is funded through the collection of a tax on each ton of coal mined within the United States. (26 U.S.C. §§ 4121 and 9501)

In those claims filed after June 30, 1973 the United States Department of Labor processes and adjudicates the application for benefits in accordance with procedures set forth in the Black Lung Benefits Act. (30 U.S.C. § 932(a)) These procedures involve the filing of an application before a Deputy Commissioner of the United States Department of Labor and the determination of entitlement or nonentitlement of benefits by that Deputy Commissioner. (33 U.S.C. §§ 919(a-c)) The decision of the Deputy Commissioner may be appealed by either a claimant who is denied benefits or an operator who has been held responsible for the payment of benefits. This appeal takes the form of a *de novo* hearing before an administrative law judge. (20

[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, was amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, 95 Stat. 1635 and the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635.

C.F.R. § 725.421) That hearing before an administrative law judge is governed by the provisions of the Administrative Procedure Act. (5 U.S.C. § 554) (hereinafter "A.P.A."). § 422(a) of the Black Lung Benefits Act, as amended, incorporates 30 U.S.C. § 932(a), by referencing the procedural provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended. [2]

Any party dissatisfied with an administrative law judge decision may prosecute an appeal to the Benefits Review Board of the United States Department of Labor. (30 U.S.C. §§ 901 *et seq.* and 20 C.F.R. §§ 801 *et seq.*). An appeal to the Benefits Review Board is not a *de novo* appeal and is limited in scope. (20 C.F.R. § 802.301) Any party dissatisfied with a decision of the Benefits Review Board may appeal as a matter of right to the United States Court of Appeals for the Circuit in which the injury occurred or in which substantial coal dust exposure took place. (33

[2] Section 422(a) states that

> [d]uring any period after December 31, 1973, in which a state workmen's compensation law is not included on the list published by the Secretary under Section 421(b) of this part, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927), as amended, and as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof), shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of [§ 424] § 9501(d) of the Internal Revenue Code of 1954, be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, . . .

U.S.C. § 921(c); *Consolidation Coal Co. v. Chubb*, 741 F.2d 968 (7th Cir. 1984)) The scope of review of the United States Court of Appeals is similar to that of the Benefits Review Board. The scope of review is limited to a determination of whether or not the decision of the administrative law judge is supported by the substantial evidence in the record when considered as a whole and in compliance with the law.

This matter involves the five statutory presumptions which operate to ease the claimant's burden of proving each element of a claim by presuming one or more elements upon the establishment of various invoking facts. (30 U.S.C. § 921(c)) After the 1972 Amendments, the Secretary of Health, Education and Welfare adopted special interim rules for the adjudication of claims filed under Part B of the Act which further eased the claimant's burden to establish a prima facie case. (20 C.F.R. § 410.490)

These interim adjudicatory rules were directly responsive to the concerns of Congress and premised solely on administrative considerations. At that time Congress noted

> [the] backlog of claims which have been filed . . . cannot await the establishment of new facilities or the development of new medical procedures. They must be handled under present circumstances in the light of limited medical resources and techniques.
>
> Accordingly the Committee expects the Secretary [of Health, Education and Welfare] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these amendments.[3]

20 C.F.R. § 410.490 included a lengthy introductory statement quoting liberally from this legislative history. The standards adopted did not represent, and did not purport to represent, sound medical criteria for evaluating disability due to pneumoconiosis. Instead the rules presume total disability or death due to pneumoconiosis upon the presentation of alternative kinds of evidence, and were subject to rebuttal.

When the Act was amended by the Black Lung Benefits Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, Congress noted that there was no indication that the concerns justifying the interim rules governing claims under Part B had been resolved when Part C became effective:

> The Senate directives with regard to the "interim" standards clearly spoke to standards that would remain until "the establishment of new facilities or the development of new medical procedures." (S. REP. No. 743, at 18) That was the clear and explicit condition underscoring the need for the duration of "interim" medical standards. Under the H.E.W. interpretation, these developments somehow magically occurred at the onset of Part C of the program. The Congress did not intend in adopting the Senate initiative, as H.E.W. so unequivocally asserts, that this "interim" approach should suddenly conclude at the determination date for new Part B filings.[4]

[3] S. REP. No. 743, 92nd Cong., 2d Sess. 18 (1972), *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 2305, 2322-23.

[4] H.R. REP. No. 1, 95th Cong. 1st Sess. 15 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 237, 251; *and in* HOUSE COMM. ON EDUCATION AND LABOR, BLACK LUNG BENEFITS REFORM ACT AND BLACK LUNG BENEFITS REVENUE ACT OF 1977, 96th Cong. 522 (1979).

As a result, the Secretary of Labor was directed to adopt criteria not more restrictive than the interim criteria for all claims reviewed and filed prior to the adoption of permanent standards. (30 U.S.C. § 902(f)(2)) These criteria appear at 20 C.F.R. § 727.203, and are commonly referred to as the "interim presumption."[5] Although the criteria developed by the Secretary of Labor are not more restrictive than those applied under Part B, they operate in a system which is distinct, in that the rules of evidence and burdens of proof to be applied to the parties are derived from different sources. These distinctions are the product of the statute itself, and were acknowledged throughout its legislative history. The question of the burden of proof to be applied to the interim presumption constitutes the basic issue for consideration by this Court.

In the case of *Stapleton v. Westmoreland Coal Co.*,[6] (unpublished A.L.J. opinion, April 14, 1981), (App. 1096a), the administrative law judge invoked the interim presumption based upon a single positive x-ray. He reached this conclusion even though the record contained two additional x-rays which were read as negative for the presence of coal workers' pneumoconiosis. (App. 113a) The administrative law judge concluded that ten years of coal mine employment and a single positive x-ray were all that were necessary for invocation of the interim presumption. The administrative law judge felt that there was no necessity for consideration of the two other negative chest x-rays prior to invocation of the interim presumption. On

[5]The Department of Labor's permanent standards were adopted effective March 31, 1980 and are found at 20 C.F.R. § 718.1 *et. seq.*

[6] Westmoreland Coal ~~Company~~ is an independent corporation without parent, subsidiary or other corporate relationship requiring disclosure under Rule 28.1.

considering rebuttal, however, the administrative law judge weighed all the chest x-ray evidence, as well as the medical opinions of record, and concluded that the claimant did not suffer from pneumoconiosis and, therefore, found rebuttal. (20 C.F.R. § 727.203(b)(4)) Stapleton thereafter appealed to the Benefits Review Board. The Benefits Review Board held that the administrative law judge erroneously invoked the presumption pursuant to 20 C.F.R. § 727.203(a)(1) without weighing all the x-ray evidence prior to invocation to determine whether the evidence as a whole supported invocation. However, the Benefits Review Board held that this error is harmless, because the administrative law judge did consider the entirety of the x-ray evidence on rebuttal and credited the negative interpretations over the positive readings. The Board concluded that substantial evidence supported the administrative law judge's finding that the x-ray evidence did not establish the existence of coal workers' pneumoconiosis. (App. 102a)

Stapleton appealed the Board's order to the United States Court of Appeals for the Fourth Circuit arguing that the administrative law judge's invocation under 20 C.F.R. § 727.203(a)(1) was correct, but that the administrative law judge and Benefits Review Board erred in allowing rebuttal under 20 C.F.R. § 727.203(b)(4) where invocation had been established under subsection (a)(1).

Respondent Westmoreland Coal Company adopts the statement of the case regarding the remaining claims as set forth in the Brief of Petitioner.

On February 11, 1985 the United States Court of Appeals for the Fourth Circuit on its own motion consolidated three cases for an *en banc* review. At this time the Court of Appeals requested that two questions be ad-

dressed by the parties to this appeal. The first question posed by the *en banc* panel is the same question which is present before this Court; that is, "whether any single item of evidence invokes the presumption, notwithstanding the presence in the record of equally probative or more probative likekind evidence?" Regarding this question the United States Court of Appeals for the Fourth Circuit directed the parties to address the Circuit's earlier decision in *Consolidation Coal v. Sanati,* 713 F.2d 480 (4th Cir. 1983).

On February 26, 1986, the United States Court of Appeals for the Fourth Circuit rendered its decision in *Stapleton* (785 F.2d 424 (4th Cir. 1986) (App. 1a)). In doing so, the Court overruled its prior decision in *Sanati, supra,* and by a seven to four majority held that the interim presumption is invoked when there is credible evidence that a qualifying x-ray, ventilatory function study, or arterial blood gas study meets the description of standards set forth in the interim presumption. Further, the Court held that a single reasoned medical opinion is sufficient to provide for invocation of the interim presumption even in the face of competing, opposite opinions and conclusions.

The denial of benefits to Stapleton was affirmed as the Court held that invocation by a single x-ray was appropriate and that rejection of the x-ray evidence on rebuttal was also appropriate where a preponderance of the evidence on rebuttal established that Stapleton did not have coal workers' pneumoconiosis. The Court vacated and remanded the denial of Ray's claim and affirmed the award of benefits in Cornette.

II.

SUMMARY OF THE ARGUMENT

The standard of proof which governs the adjudication process under the Black Lung Benefits Act, as amended, is governed by the Administrative Procedure Act which provides for a preponderance of the evidence standard to be utilized. The United States Court of Appeals for the Fourth Circuit has erred in refusing to apply the preponderance standard to the invocation of the interim presumption. This preponderance of the evidence standard has been utilized since the inception of the interim presumption and has therefore been applied to a large number of cases which have either been resolved or are currently in the appellate process.

Because invocation of the interim presumption by any one of five factors means two other critical factors necessary for an award of benefits are presumed, the standard for determining invocation by any one of the five methods should be by a preponderance of the evidence, and not by a mere scintilla.

III.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN FINDING THAT THE MERE EXISTENCE OF ONE POSITIVE X-RAY; OR ONE SET OF QUALIFYING VENTILATORY STUDIES; OR ONE SET OF QUALIFYING ARTERIAL BLOOD GAS STUDIES; OR ONE PHYSICIAN'S OPINION AUTOMATICALLY INVOKES THE INTERIM PRESUMPTION EVEN WHERE A PREPONDERANCE OF THE EVIDENCE IN EACH SUB-CATEGORY WOULD NOT WARRANT SUCH INVOCATION.

The regulatory section adopted by the Secretary of Labor to implement the interim preseumption is bifurcated into sections dealing with the invocation and rebuttal of that presumption. There are five different ways in which the presumption can be invoked. Each requires a preliminary showing that the miner was engaged in coal mine employment for a minimum period of ten years.[7] With proof of employment, the miner is presumed totally disabled as a result of coal workers' pneumoconiosis if it is established through any one of these criteria that: (1) he has coal workers' pneumoconiosis as evidenced by a chest x-ray, biopsy or autopsy; (2) his performance on ventilatory function studies falls below certain specified levels; (3) his performance on arterial blood gas studies falls below certain specified levels; (4) he is totally disabled by a respiratory or pulmonary condition as evidenced by other medical evidence including the documented opinion of a physician exercising reasoned medical judgment; or (5) in the case of a deceased miner where no other medical evidence is available, the affidavit of a surviving spouse or

[7] *But see Halon v. Director*, 713 F.2d 30 (3d Cir. 1983).

other person with knowledge of the miner's physical condition which demonstrates the presence of a totally disabling respiratory or pulmonary impairment. (20 C.F.R. § 727.203(a))[8]

The interim presumption provides a claimant who has at least ten years of coal mine employment with a powerful advantage in the consideration of his claim. By showing by a preponderance (or by a scintilla as mandated by *Stapleton*) of the evidence of the existence of one of these five criteria, the claimant is presumed (1) to have coal workers' pneumoconiosis; (2) to be totally disabled by a pulmonary or respiratory impairment; and (3) that the impairment arose out of his coal mine employment.[9] This advantage is easily illustrated by referring to each of these five subsections. Under subsection (a)(1), a miner with ten years of coal mine employment can establish by chest x-rays showing simple coal workers' pneumoconiosis not only that he has the disease, but he will be presumed to be totally disabled thereby. This presumption of total disability arises dsepite the fact that x-ray evidence establishes only the existence of the disease and in no way indicates any level of disability. *See, Usery v. Turner Elkhorn Coal Co.*, 428 U.S. 1 (1969); *Webb v. Armco Steel Corp.*, 6 BLR 1-1120 (BRB 1984); *Arnoni v. Director, Office of Workers' Compensation Programs*, 6 BLR 1-423 (BRB 1983); *Engle v. Pagnotti Enterprises*, 5 BLR 1-746 (BRB 1983); *Spencer v. Winston Mining*, 1 BLR 1-996 (BRB 1978).

[8] The fifth method of invocation because it relates only to deceased miners, was not directly considered by the Court in *Stapleton*. However, the legal issues are the same as those relating to claims by a living miner.

[9] A claimant need only invoke under any one of the five subsections and once invocation is found by the trier of fact, no further inquiry need be made regarding the other possible methods of invocation. *See, Taranto v. Barnes and Tucker Co.*, 4 BLR 1-308 (BRB 1981).

In the alternative, under subsections (a)(2) and (a)(3), a claimant may establish by obtaining values lower than those set forth in the table accompanying these subsections not only that he suffers from a totally disabling pulmonary or respiratory impairment, but that the impairment arises from coal workers' pneumoconiosis caused by coal mine employment. Because values lower than those set forth in these tables, in medical fact, at the most may illustrate some degree of respiratory impairment of unknown origin, this again illustrates the tremendous power of the interim presumption.[10]

Under subsection (a)(4), a claimant may establish entitlement to the interim presumption by presenting a documented opinion of a physician which establishes the presence of a totally disabling respiratory or pulmonary impairment. A physician's report or other medical evidence which reflects the presence of a totally disabling respiratory or pulmonary impairment also establishes that the impairment is the result of coal workers' pneumoconiosis and that the coal workers' pneumoconiosis arose from coal mine employment.

Finally, under subsection (a)(5) in the absence of other medical evidence regarding a deceased miner, the claimant need only provide an affidavit of a survivor of the miner or other person with knowledge of the miner's physical condition for it to be presumed that the miner suffered from pneumoconiosis, that the miner was totally disabled

[10] The medical criteria of the interim presumption were not considered medically sound, were not intended to be medically sound, and were in fact constructed without reference to meaningful medical considerations for the evaluation of disability. No medical inference whatever arises from the fact that results on a particular study fall either above or below the tables set forth in these presumptions — the tables have only legal significance and are only relevant in invocation.

due to pneumoconiosis at the time of death, or that the miner's death was due to pneumoconiosis.

The power of the interim presumption arises not from its invocation by a scintilla of the evidence which meets one of the sub-categories, but from the fact that once a claimant establishes his ability to meet the requirements of any one of these sub-categories by a preponderance of the evidence, the rest of the elements of the claim are presumed; the presumption acts to fill in the remaining pieces of the puzzle necessary for entitlement to black lung benefits. Where only simple coal workers' pneumoconiosis is shown, the presumption provides for a finding of total disability due to pneumoconiosis unless that presumptive finding can be rebutted.

The standard of proof requiring that a preponderance of the evidence be weighed in any sub-cateogry prior to invocation of the interim presumption is well-founded in both the Act, regulations and case law. § 422(a) of the Black Lung Benefits Act, as amended, 30 U.S.C. § 932(a) incorporates by reference the procedural provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, (hereinafter "Longshore Act").[11] Be-

[11] § 422(a) During any period after December 31, 1973, in which a State workmen's compensation law is not included in the list published by the Secretary under section 421(b) of this part, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927), as amended, and as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof), shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent, with the provisions of [section 424] section 9501(d) of the Internal Revenue Code of 1954), be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, ...

cause this Act was passed in early 1972, and subsequently the Longshore Act was amended on at least two occasions, it has been contended that § 422 only incorporate the Longshore Act in its form prior to the 1972 amendments.

The circuits have held, however, that § 422 effectively incorporates the appropriate provisions of the Longshore Act and any subsequent amendments.[12] Section 19(d), enacted with the 1972 amendments, provides that longshore hearings are to be conducted in accordance with the A.P.A. (5 U.S.C. § 554). Furthermore, because the Black Lung Benefits Act, as amended, does not indicate a specific standard of proof which governs the adjudication process, § 5 of the APA, (5 U.S.C. § 554) applies, ". . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[13] This Court in the case of *Steadman v. Securities and Exchange Commission*, 450 U.S. 91, *reh. den.* 451 U.S. 933 (1981), held that 5 U.S.C. § 556 (designated § 7(c) of the 1946 Act) provides for a preponderance of the evidence standard. Mr. Justice Brennan for the Court stated:

> The language and legislative history of § 7(c) lead us to conclude, therefore, that § 7(c) was intended to establish a standard of proof and that the

[12] *Patton v. Director*, 763 F.2d 553 (3d Cir. 1985), *Director v. National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977), *Director v. Alabama By-Products Corp.*, 560 F.2d 710 (5th Cir. 1977), *Director v. Eastern Coal Corp.*, 561 F.2d 632 (6th Cir. 1977) and *Director v. Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977).

[13] 5 U.S.C. § 559 requires the application of the requirements of the APA unless the statute expressly supersedes or modifies the requirements of the APA. The Federal Black Lung Benefits Act, as amended, does not expressly amend the requirements of the APA in this area.

> standard adopted is the traditional preponderance of the evidence standard.
>
> (450 U.S. 102)

The application of a preponderance standard to the invocation of the interim presumption has been consistently applied since the effective date of the interim presumption by the United States Department of Labor. Further, the Benefits Review Board, the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Sixth Circuit have issued opinions setting forth this preponderance standard. The Fourth Circuit in *Consolidation Coal Co. v. Sanati*, 713 F.2d 480 (4th Cir. 1983) was confronted with the question of whether or not the interim presumption under subsection (a)(4) must be invoked by a single reasoned medical opinion of a physician who finds a totally disabling pulmonary or respiratory impairment. The Court noted that a preponderance of the evidence standard has been required for invocation of the interim presumption even under the more lenient evidentiary criteria applied to claims under Part B and held that:

> Invocation of the § 727.203(a)(4) presumption solely on the basis of one physician's opinion, without weighing it against other physicians' contrary opinions, is contrary to our holdings in *Sharpless v. Califano*, 585 F.2d 664 (4th Cir. 1978), and *Petry v. Califano*, 577 F.2d 860 (4th Cir. 1978). *Sharpless* and *Petry* involved the similar presumptions of total disability due to coal workers' pneumoconiosis provided for in 20 C.F.R. §§ 419.490(b) and 410.414(b), respectively. In both cases, we held that the claimant has the burden of proving by a preponderance of the evidence all the facts necessary to establish the

> presumption. 585 F.2d at 667; 577 F.2d at 864; *see Steadman v. S.E.C.*, 450 U.S. 91 (1981). Our cases require the administrative tribunal to weigh all the evidence relevant to a fact necessary to establish a presumption before deciding to invoke the presumption. 585 F.2d at 667; 577 F.2d at 863. We note in passing that in cases involving at least two of the other presumptions set out in 727.203(a), the Board itself has held that an ALJ must consider and weigh all the competent and relevant evidence bearing on the fact in question in determining whether to invoke the presumption.

(713 F.2d at 481-82)

In *Bozick v. Consolidation Coal Company*, 735 F.2d 1017 (6th Cir. 1984), a panel of the Sixth Circuit recognized the Fourth Circuit's opinion in *Consolidation Coal Co. v. Sanati* and adopted the Benefits Review Board's decision in *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (BRB 1984). In *Meadows*, the Board noted,

> Recently, however, in *Consolidation Coal Company v. Sanati*, 713 F.2d 480 (4th Cir. 1983), the United States Court of Appeals for the Fourth Circuit held that, 'One such documented [opinion] in the presence of other and contrary evidence may not require *the presumption to be invoked absent a weighing of the opinion against the other evidence.' Id.*, at 482, n. 3 (emphasis in original.) The Court held that where the record contains conflicting medical reports, it is the obligation of the administrative law judge to weigh all the medical reports of record and ascertain whether or not claimant has established the presence of a totally disabling respiratory or pulmonary impairment pursuant to subsection (a)(4). We find the Court's reasoning persuasive. We note, as did the Fourth Circuit, that a single opinion may invoke the interim presumption. That opinion must be weighed, however, against the other medical opinions prior to invocation.

(6 BLR 1-776)

This decision citing *Sanati* was consistent with earlier decisions of the Benefits Review Board in *Justice v. Jewell Ridge Coal Co.*, 3 BLR 1-547, 1-550 (BRB 1981) involving chest x-rays and *Strako v. Ziegler Coal Co.*, 3 BLR 1-136, 1-143 (BRB 1981) involving pulmonary function studies.

In July of 1985, the United States Court of Appeals for the Sixth Circuit in *Moseley v. Peabody Coal Co.*, 769 F.2d 357 (6th Cir. 1985) adopted the Fourth Circuit's *Sanati* opinion requiring a preponderance standard prior to invocation under § 727.203(a)(4). This adoption of *Sanati* was also followed by the Sixth Circuit in *Engle v. Director, Office of Workers' Compensation Programs*, 792 F.2d 63, 64, n. 1 (6th Cir. 1986).

In 1986, the United States Court of Appeals for the Fourth Circuit rendered its decision in *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424 (4th Cir. 1986). In *Stapleton*, seven members of the *en banc* panel set forth in three separate opinions their belief that the interim presumption under § 727.203(a) is invoked where there is a single credible piece of evidence under any of the five means of invocation discussed by the Court.[14] A different group of seven judges, however, held that, under (a)(4) where invocation is by any means other than a reasoned medical opinion, it must be proven by a preponderance of the evidence other than arterial blood gases, pulmonary

[14] *Cline v. Beatrice Pocahontas Coal Co.*, 802 F.2d 1524 (4th Cir. 1986); *Accord Lagamba v. Consolidation Coal Co.*, 787 F.2d 172 (4th Cir. 1986); *Haynes v. Jewell Ridge Coal Co.*, 790 F.2d 1113 (4th Cir. 1986).

function studies, chest x-rays or by a reasoned medical report.

The decision of the *Stapleton* Court was, at best, inconsistent if not schizophrenic. As noted by Judge Phillips in his concurring and dissenting opinion,

The burdens of persuasion borne by both claimant and operator respectively are burdens to prove the relevant facts by a preponderance of the evidence.* * *

Given the conceptual and practical difficulties involved, it is, therefore no reproach to the drafters of the "interim presumption" of 20 C.F.R. § 727.203 to start with the proposition that this presumption's intended operation is by no means manifest from its 'plain words'. That very fact, however, makes it difficult to find any particular interpretation of its intended operation 'plainly erroneous or inconsistent' in relation to its text.

(785 F.2d at 442)

As Judge Phillips noted, it is the inexact language of the individual subsections of the interim presumption which have in no small part helped to obscure the requirements of the APA that each subsection be proved by a preponderance of the evidence prior to invocation. If we examine the language of subsection (a)(1), it states that the interim presumption will be triggered if, "*A* chest roentgenogram (x-ray), biopsy or autopy *establishes* the existence of pneumoconiosis. (*See,* § 410.428 of this title) (emphasis added) In contrast, subsection (a)(2) states that the interim presumption will be invoked if,

> Ventilatory studies *establish* the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which were equal to or less than the values specified in the following table. (emphasis added)

Subsection (a)(1) speaks of "*A* chest roentgenogram . . .", clearly indicating that a chest x-ray, a biopsy or an autopsy which establishes the presence of pneumoconiosis may result in invocation. Subsection (a)(2), however, speaks in the plural form indicating that, "ventilatory studies . . . as demonstrated by values . . ." must be considered before determining whether or not the presumption is invoked. Likewise, subsection (a)(3) dealing with arterial blood gas studies again speaks in the plural. Subsection (a)(4) speaks of,

> Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling pulmonary or respiratory impairment.

Subsection (a)(4) speaks in both the singular and the plural in describing "other medical evidence (plural) and ". . . a physician exercising . . ." (singular). Finally, subsection (a)(5) speaks in terms of, "The affidavit of the survivor . . .", which speaks in the singular while noting that it would only be applicable in the absence of other medical evidence. The inartfulness of the United States Department of Labor's drafting, however, does little to provide insight as to whether the scintilla or preponderance standard should be applied to the interim presumption. It can be fairly stated that the interim presumption internally does not set forth any burden of proof different than that required by APA.

Westmoreland concedes that a single x-ray, single pulmonary function study, single arterial blood gas study, or single reasoned medical report which finds a totally disabling pulmonary or respiratory impairment or in the absence

of any medical evidence, a single affidavit, may suffice to invoke the interim presumption. However, where a preponderance of the chest x-rays are negative for coal workers' pneumoconiosis; a preponderance of the ventilatory studies are above those standards set forth in the interim tables; where a preponderance of the arterial blood gas studies have values above those in the interim tables; where a preponderance of the physicians' opinions exercising reasoned medical judgment does not establish the presence of a totally disabling pulmonary or respiratory impairment; or where there are multiple affidavits present with a preponderance not supporting that a decedent suffered from a totally disabling pulmonary or respiratory disease, then the interim presumption should not be invoked by a single piece of medical or lay evidence.

In determining the preponderance of the evidence, an administrative law judge traditionally has looked to the relative qualifications of the individual physicians, the adherence to quality standards and (due to the progressive and irreversible nature of this disease) may place greater reliance on more recent testing. *See, Orange v. Island Creek Coal Co.*, 786 F.2d 724 (6th Cir. 1986) *Triplett v. Incoal Coal Co.*, 2 BLR 1-633 (BRB 1979); and *Cleavenger v. Director*, 2 BLR 1-557 (BRB 1979) As a result, an administrative law judge in evaluating whether or not the interim presumption is invoked under subsection (a)(1), may credit the more recent chest x-rays as well as crediting those chest x-rays by "B" readers.[15] Because these deter-

[15] The National Institute for Occupational Safety and Health was required by the Federal Mine Safety and Health Act of 1977 to develop and implement a certification program for readers of coal miners' chest roentgenograms. A "B" reader certification is the highest classification and thereby entitled to greater evidentiary weight. *See*, 42 C.F.R. §§ 37.1 *et seq.*, *Winfrey v. Califano*, 620 F.2d 37 (4th Cir. 1980) and *Sharpless v. Califano*, 585 F.2d 664 (4th Cir. 1978).

minations are within the sound discretion of the trier of fact, the invocation of the interim presumption does not resolve itself down to a mere numbers game, where an administrative law judge mechanically determines the invocation of the interim presumption based upon the amounts of qualifying or nonqualifying medical evidence. Furthermore, because of the remedial nature of the Act, it is appropriate for the administrative law judge to resolve all true doubt [i.e., the doubt which arises when the evidence tending to prove a fact and that tending to disprove a fact is equally probative and persuasive] in favor of the claimant in determining whether or not to invoke the interim presumption.

Nowhere in the APA, Longshore Act or the Federal Black Lung Benefits Act, however, is it suggested that a standard other than that commonly utilized by the APA, that of a preponderance, should be utilized in determining invocation under the interim presumption. The Court's suggestion in *Stapleton* that a scintilla of positive evidence in the face of a preponderance of negative evidence shall result in findings of invocation is not supported in the Act, regulations, or case law.

It is precisely because of the tremendous power of the interim presumption that the issue of whether invocation is by a scintilla or by a preponderance of the evidence becomes important. Under the rule of law set forth by the Fourth Circuit in *Stapleton*, the medical record could contain ten negative x-rays, all by Board-certified radiologists and N.I.O.S.H. certified "B" Readers, with one positive x-ray having been read by a general practitioner thus resulting in invocation of the interim presumption. Notwithstanding above-standard arterial blood gases and pulmonary function studies, if there are no medical opinions in

the record, this single positive x-ray arising from a poorly qualified practitioner, would in the absence of a reasoned medical opinion to the contrary, result in invocation. The presumption could then not be rebutted by the ten readings of the same chest x-ray even if they were more recent in time and by more qualified practitioners, due to the prohibition in the Act that a claim shall not be rejected solely on the basis of negative x-ray readings. This wholly improper result fits the requirements laid down by *Stapleton* while doing violence to the basic precepts of the Act and regulations.

V.

CONCLUSION

Deference should be paid to the burden of proof prescribed by the APA, to the interpretation of the Secretary and to the practice of the administrative law judges and Benefits Review Board which have governed the resolution of thousands of federal black lung claims and continues to govern their disposition in those circuits other than the Third and Fourth Circuits. Therefore, Westmoreland Coal Company requests that the opinion of the United States Court of Appeals for the Fourth Circuit in *Stapleton v. Westmoreland Coal Company* be reversed consistent with the arguments raised herein.

Respectfully submitted,

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No. 86-327 (6)

In the Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether an otherwise eligible claimant for black lung benefits automatically invokes a presumption of compensable disability under 20 C.F.R. 727.203(a) by introducing one piece of qualifying medical evidence.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-101a) are reported at 785 F.2d 424.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1986. Petitions for rehearing were denied on April 21, 1986 (Pet. App. 152a-154a). The Chief Justice extended the time for filing a petition for a writ of certiorari to August 29, 1986 (Pet. App. 155a). The petition was filed on August 29,

1986, and this Court granted certiorari on January 12, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The non-federal respondents are coal miners who filed claims with the Secretary of Labor for black lung benefits. Upon completion of administrative proceedings, their cases were heard by the en banc Fourth Circuit. The court overruled several prior decisions and adopted a new interpretation of the regulation that defines the proof scheme for adjudication of the claims at issue. Petitioners, who are coal mine operators and an operator's insurer, challenge the Fourth Circuit's ruling. The federal respondent agrees that the Fourth Circuit's ruling should be reversed.

1. Statutory and Regulatory Framework

Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended in 1972, 1977, 1978, and 1981, 30 U.S.C. (& Supp. III) 901 *et seq.*, establishes a benefit program for coal miners who are totally disabled by pneumoconiosis (black lung disease) arising out of coal mine employment. See generally *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Claims filed prior to July 1, 1973, are filed under Part B of the program and are adjudicated by the Social Security Administration (SSA) pursuant to regulations codified at 20 C.F.R. Pt. 410. See 30 U.S.C. 924, 925. Claims filed on or after July 1, 1973, are filed under Part C of the program and are adjudicated by the Secretary of Labor. See 30 U.S.C. (& Supp. III) 925, 931. Part C claims are further divided into two groups: those filed on or after April 1, 1980, which are governed by the Secretary's permanent criteria, codified at 20 C.F.R. Pt. 718 (see 20 C.F.R. 725.4(a)); and those filed prior to April 1, 1980, which are governed by the Secretary of Labor's "interim regulations," codified at 20 C.F.R. Pt. 727.

This case involves the Part C interim regulations and the proof scheme they establish for adjudicating claims for benefits filed by miners. Those regulations apply to approximately 10,000 pending claims, filed between July 1, 1973 and April 1, 1980. Benefits under this part of the program—indeed, under all of Part C—are paid by coal mine operators or, in certain instances specified by statute, by a federal Black Lung Disability Trust Fund.[1] The federal respondent—the Director, Office of Workers' Compensation Programs—is responsible, by delegation of the Secretary of Labor's authority, for administering the federal fund and for the initial processing of claims under Part C of the black lung program. 20 C.F.R. 701.201, 701.202.

The Part C interim regulations, promulgated in 1978 (43 Fed. Reg. 36818), were authorized by Section 2 of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (codified at 30 U.S.C. 902(f)). The statute requires that the interim regulations "shall not be more restrictive than"

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[1] The Black Lung Disability Trust Fund pays benefits where a miner's last coal mine employment ended before January 1, 1970, where a responsible operator cannot be identified, and in certain cases that are reopened after initial denial. 30 U.S.C. 932(c)(1), (2), and (j)(3), 934. The Fund is financed by an excise tax on the sale of coal (see 26 U.S.C. 4121) and has the power to borrow from the United States Treasury when its expenditures exceed its income (26 U.S.C. 9501(c)). The Fund is currently 2.9 billion dollars in debt to the federal treasury.

the criteria governing pre-July 1, 1973 claims under Part B. 30 U.S.C. 902(f)(2). It further requires that, like the Part B regulations, they ensure that "all relevant evidence" be considered "where relevant" in adjudicating claims for benefits. 30 U.S.C. 923(b). See H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978).

Under the Part C interim criteria, miners need not prove all three elements of a claim for black lung benefits—the disease of pneumoconiosis, total disability, and causation by coal mine employment. See 30 U.S.C. 901, 902(b).[2] Rather, under 20 C.F.R. 727.203, certain miners may, by establishing certain limited "basic facts" (see Pet. App. 39a n.5 (opinion of Phillips, J.)), invoke a presumption of compensable total disability and hence entitlement to benefits. The employer or Director may then rebut the presumption.[3]

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[2] The statute (30 U.S.C. 902(b)) and regulations (20 C.F.R. 727.202) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment. For clarity, we will hereafter use "pneumoconiosis" to refer solely to the disease, treating the question of causation as distinct.

[3] If a claimant is unable to invoke the presumption or the presumption is invoked and rebutted, the claimant may nonetheless attempt to establish eligibility in either of two ways. The claimant may proceed under 20 C.F.R. Pt. 718. See 20 C.F.R. 727.203(c) and (d). Alternatively the claimant may proceed directly under the statute and thus seek to prove the elements of the claim by a preponderance of the evidence, using any applicable statutory presumptions. See 30 U.S.C. 921(a) and (c)(1)-(5). The court of appeals considered the claims at issue in this case only under the Part C interim criteria.

Specifically, Subsection (a) of 20 C.F.R. 727.203[4] provides that a miner who engaged in coal mine employment for at least 10 years is presumed to be totally disabled due to pneumoconiosis arising out of that employment if any one of four specified medical evidentiary requirements is met.[5] Subsection (b)

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[4] Hereinafter, "Subsection ——" and "§ —" refer to subsections of 20 C.F.R. 727.203 unless otherwise indicated.

[5] 20 C.F.R. 727.203(a) states:

> *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);
>
> (2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than [specified] values * * * [;]
>
> (3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than [specified] values * * * [;]
>
> (4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;
>
> * * * * *

Subsection (a)(5), which provides for lay evidence in the case of a deceased miner where no medical evidence is available, is not at issue in this case.

provides that the presumption may be rebutted by showing that the miner is doing, or is able to do, his usual coal mine work or comparable gainful work; that his disability does not arise, even in part, from coal mine employment; or that he does not suffer from pneumoconiosis.[6] In conformity with the statutory requirement (30 U.S.C. 923(b)), Subsection (b) also provides that in adjudicating a claim under the interim criteria, all relevant medical evidence shall be considered.

2. Administrative Proceedings

All three cases below began when the non-federal respondents, who are miners or former miners, filed claims for benefits with the federal respondent. Each claim was initially decided by an Office of Workers' Compensation Programs Deputy Commissioner. 20 C.F.R. 725.418, 725.419. In each case, the non-prevailing party requested a hearing before an administrative law judge (ALJ) (see 20 C.F.R. 725.419(a), 725.451)), who rendered a decision after receiving additional evidence (see 20 C.F.R. 725.476, 725.477). In respondent Stapleton's case, the ALJ invoked the presumption based on a single positive X-ray, but then found the presumption rebutted (Pet. App. 106a-117a). In respondent Ray's case, the ALJ refused to invoke the presumption, weighing the evidence and finding it unpersuasive in any of the Subsection (a) categories (Pet. App. 125a-134a). In respondent Cornett's case, the ALJ invoked the presumption based on the weight of the evidence in three categories and then found the presumption unrebutted (Pet. App. 141a-151a).

The ALJ decisions were appealed to the Benefits Review Board, which reviewed them for substantial evidence and conformity with law (see 30 U.S.C. (Supp. III) 932(a), incorporating 33 U.S.C. 921(b)(3)) and affirmed in all three cases. In Stapleton's case, the Board affirmed the ALJ's denial of the claim but held that the presumption should not have been invoked based on a single piece of evidence (Pet. App. 102a-105a). In Ray's case, the Board affirmed the ALJ's finding that Ray was not entitled to the presumption (Pet. App. 118a-124a). In Cornett's case, the Board affirmed both the ALJ's invocation of the presumption and his finding of no rebuttal (Pet. App. 138a-140a, 135a-137a).

3. Judicial Proceedings

The unsuccessful parties before the Board filed petitions for review in the Fourth Circuit, which sua sponte ordered the three cases consolidated and heard en banc. The court directed the parties to address two questions regarding the proper interpretation of

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[6] 20 C.F.R. 727.203(b) states:

> *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:
>
> (1) the evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or
>
> (2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or
>
> (3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or
>
> (4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

the interim regulations: whether a claimant could invoke the presumption with a single piece of "qualifying" medical evidence;[7] and whether and to what extent "non-qualifying" medical evidence could rebut the presumption. The court requested the parties to address these issues in light of its previous panel decisions in *Hampton* v. *United States Dep't of Labor Benefits Review Bd.*, 678 F.2d 506 (4th Cir. 1982), *Consolidation Coal Co.* v. *Sanati*, 713 F.2d 480 (4th Cir. 1983), and *Whicker* v. *United States Dep't of Labor Benefits Review Bd.*, 733 F.2d 346 (4th Cir. 1984).[8]

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[7] The term "qualifying" was used by the court to refer to medical evidence that is positive and would suffice, in the absence of any contrary evidence of the same type, to invoke the presumption. For example, an X-ray that disclosed pneumoconiosis (§ (a)(1)) or ventilatory studies that revealed a respiratory or pulmonary impairment of the specified magnitude (§ (a)(2)) would be qualifying evidence. Negative or uncertain results on an X-ray or in ventilatory studies would, by contrast, be "non-qualifying."

In addition, as Subsection (a) itself indicates, all medical evidence is subject to regulatory standards for quality. See, *e.g.*, 20 C.F.R. 410.428(a)(1), (b), and (c) (X-ray, biopsy, and autopsy standards) (incorporated in 20 C.F.R. 727.203(a)(1), 727.206(a)); 20 C.F.R. 410.430 (ventilatory study standards) (incorporated in 20 C.F.R. 727.203(a)(2)). Evidence that meets these standards is referred to as "conforming" evidence.

[8] In *Sanati*, the court agreed with the Director that invocation of the presumption under Subsection (a)(4) must depend on a weighing of all physician report evidence. 713 F.2d at 481-482. In *Hampton* and *Whicker*, the court placed significant restrictions on the range of permissible rebuttal evidence, ruling that a doctor's opinion based in part upon non-qualifying ventilatory function and blood gas test results constituted "improper rebuttal evidence" (*Hampton*, 678 F.2d at 508). See *Whicker*, 733 F.2d at 348.

The Director intervened in the appeal, arguing that a claimant may invoke the presumption only by a preponderance of the medical evidence in a particular category—for example, by proving the existence of pneumoconiosis by a preponderance of the X-ray, biopsy, and autopsy evidence (under § (a)(1)), or by proving a totally disabling respiratory or pulmonary impairment by a preponderance of the "[o]ther medical evidence" (under § (a)(4)). The Director also argued that, once the presumption was invoked, the burden of persuasion, and not just the burden of going forward, shifted to the employer or Director. He argued that, at the rebuttal stage, negative or otherwise non-qualifying medical evidence could be relevant, but only if submitted in support of a reasoned medical judgment. See Pet. App. 84a-87a (opinion of Sprouse J. (quoting Director's brief)). The Director further argued that facts already proven at the presumption stage could not be relitigated at the rebuttal stage, at least not with the same type of evidence.[9]

The en banc court of appeals issued a per curiam opinion announcing the disposition of the three cases before it and referring, for the guiding rules of law, to various combinations of its four lengthy opinions.[10]

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[9] For example, proof at the invocation stage of pneumoconiosis based on X-ray, biopsy, and autopsy evidence (under § (a)(1)) implies that the existence of pneumoconiosis may not be relitigated at the rebuttal stage, at least not without introducing relevant evidence other than X-ray, biopsy, or autopsy evidence. See Pet. App. 37a-40a (opinion of Phillips, J.) (summarizing Director's position).

[10] The court split into three groups. One group (Chief Judge Winter, Judge Hall, Judge Sprouse, and Judge Sneeden) was represented in two opinions—one by Judge Hall (Pet. App. 5a-33a), a second by Judge Sprouse (Pet. App. 56a-

A majority of the court rejected the Director's preponderance standard for invocation, holding that an otherwise eligible claimant needs to produce only one credible piece of qualifying evidence in any of the four categories specified in Subsection (a) to invoke the presumption of compensable disability (Pet. App. 3a).[11] A different majority held that all relevant medical evidence could be considered on rebuttal, including non-qualifying test results, subject only to the statutory limitation (30 U.S.C. 923(b)) that a single negative X-ray may not be the basis for denying benefits (Pet. App. 4a); this holding rejected the Director's view that non-qualifying evidence (*e.g.*,

92a). A separate group of four judges expressed its views in an opinion by Judge Phillips (Pet. App. 34a-55a), which Judges Russell, Murnaghan, and Ervin joined. A third group expressed its views in an opinion by Judge Widener (Pet. App. 93a-101a), which Judges Chapman and Wilkinson joined.

The first and third groups formed the majority on the invocation issue. The second and third groups formed the majority on the rebuttal issue.

[11] A different majority of the court recognized one exception to this result, which arises under Subsection (a)(4). A single qualifying physician's report suffices to invoke the presumption; but if there is no such report, all other medical evidence must be weighed to determine if the presumption may be invoked under that subsection (Pet. App. 3a). Four of the judges who advocated this result agreed with the Director that the evidence in *all* categories should be weighed before the presumption is invoked (*id.* at 51a (opinion of Phillips, J.)); the three additional members of the court who concurred in this result apparently believed that the regulatory language, which requires invocation if "[o]ther medical evidence * * * establishes the presence of a totally disabling respiratory or pulmonary impairment" (§ (a)(4)), imposes by its plain terms a burden of persuasion if there is no qualifying physician's report (Pet. App. 96a-97a (opinion of Widener, J.)).

negative X-rays) should be considered probative only when offered in support of a reasoned medical opinion (see Pet. App. 25a-27a (opinion of Hall, J.)). All of the judges agreed with the Director that the rebutting party bears the burden of persuasion on rebuttal (see Pet. App. 4a; *id.* at 23a-25a (opinion of Hall, J.)).[12] Because the two divided holdings departed from the court's previous panel decisions, the court overruled the three panel decisions it had asked the parties to discuss when it set the cases for en banc hearing (see page 8, *supra*).

The several opinions below advance a number of reasons for the holding, challenged in this Court, that a claimant can generally invoke the presumption by a single qualifying test result. All the judges in the majority pointed to the language and structure of the regulation. See Pet. App. 20a, 23a (opinion of Hall, J.), 97a (opinion of Widener, J.). They noted, in particular, that Subsection (a)(1) provides that the presumption is invoked if "[*a*] chest roentgenogram * * * establishes the existence of pneumoconiosis" (emphasis added) and that the requirement that "all relevant medical evidence shall be considered" is included in Subsection (b), governing rebuttal, not Subsection (a), governing invocation of the presumption. The judges in the majority further concluded that a preponderance-of-the-evidence requirement would frustrate congressional intent to facilitate miners' efforts to prove their claims. Pet.

[12] The court also unanimously agreed with the Director (Pet. App. 29a-32a) that 20 C.F.R. 725.608(a) requires a liable coal mine operator to pay interest on past-due benefits accruing from the 30th day after the agency's initial determination to grant the claim. That aspect of the court's decision is not at issue here.

App. 70a, 77a-83a (opinion of Sprouse, J.), 94a (opinion of Widener, J.).[13] In addition, one group in the majority reasoned that the Director's approach, by generally foreclosing relitigation at the rebuttal stage of facts established at the presumption stage, would violate the statutory and regulatory command that all relevant evidence be considered. See Pet. App. 21a (opinion of Hall, J.), 71a & n.10 (opinion of Sprouse, J.). The majority thus viewed the Director's interpretation as unreasonable (Pet. App. 17a-18a (opinion of Hall, J.)) and refused to defer to it.[14]

A minority of the court agreed with the Director that a claimant should be required to prove the facts necessary to invoke the presumption in any of the Subsection (a) categories by a preponderance of the evidence. Pet. App. 34a-55a (opinion of Phillips, J.). The minority urged deference to the Director's interpretation as a permissible reading of the regulation

[13] All of the majority judges also concluded that the Administrative Procedure Act (APA), 5 U.S.C. 554, 556, 559, to the extent it establishes a burden of persuasion, had been superseded by the particular statutory and regulatory scheme for black lung benefits. Pet. App. 22a n.8 (opinion of Hall, J.), 93a (opinion of Widener, J.).

[14] One group in the majority asserted that the Director's brief amounted to "a bald litigation statement" and included no contention that "he has previously or consistently interpreted the regulation as he now interprets it as an advocating party" (Pet. App. 56a-57a (opinion of Sprouse, J.)). The other group in the majority read the comments of the Secretary upon promulgation of the interim regulations (43 Fed. Reg. 36826 (1978)) as establishing that the single-item-of-evidence view was the originally intended meaning and thought this evidence essentially decisive. Pet. App. 94a (opinion of Widener, J.).

that is consistent with the statute. *Id.* at 36a. Noting "the range of arguably reasonable interpretations that are possible with respect to the details of a regulation" such as this one, the dissenters found deference to the administrative interpretation essential "to encourage national uniformity of application" (*id.* at 36a n.2). In arguing for adoption of the preponderance standard, they also relied on the regulation's requirement that a claimant "establish" the necessary facts to invoke the presumption, just as the rebutting party must "establish" its case, as the full court agreed. *Id.* at 42a.[15] Finally, the dissenting judges argued that the majority was mistaken in thinking that the Director's interpretation renders the presumption irrebuttable: when a claimant has proved any of the "basic facts" by a preponderance of the evidence in a Subsection (a) category (*e.g.*, pneumoconiosis, under § (a)(1)), the operator remains free to rebut the resulting "presumed facts" (*e.g.*, mine-relatedness and total disability, under § (b)(1), (2), and (3)).

Applying its new interpretation of the interim regulations to the three cases before it, the court of appeals first affirmed the Board's denial of benefits (though not its reasoning) in Stapleton's case, concluding that the ALJ properly invoked the presumption and properly found it rebutted (Pet. App. 5a). In Ray's case, the court vacated the Board's decision, concluding that the ALJ should have invoked the presumption. and remanded for consideration of rebuttal (*ibid.*). In Cornett's case, the court affirmed

[15] The dissenters further asserted that the preponderance standard was not only the usual standard in civil litigation but the standard dictated by the APA where, as here, no other standard was specified. Pet. App. 41a-42a n.6.

the award of benefits, concluding that the presumption was properly invoked and not rebutted, but remanded for calculation of interest (*ibid.*).

On January 12, 1987, this Court granted the petition filed by the mine operators in Cornett's and Ray's cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The Secretary of Labor's Part C interim regulations permit certain claimants for black lung benefits to invoke a presumption of entitlement to benefits without proving all three elements of a valid claim—(i) pneumoconiosis (ii) that is totally disabling and (iii) was caused by coal mine employment. A miner with ten years' coal mine employment may invoke a rebuttable presumption of total mine-related pulmonary or respiratory disability (or death) by "establish[ing]" the facts specified, using the evidence specified, in any of the four categories listed in Subsection (a) of 20 C.F.R. 727.203—pneumoconiosis, as demonstrated by X-ray, biopsy, or autopsy evidence (§ (a)(1)); chronic respiratory or pulmonary disease, as demonstrated by ventilatory studies (§ (a)(2)); certain lung impairments, as demonstrated by blood gas studies (§ (a)(3)); or totally disabling respiratory or pulmonary impairment, as demonstrated by other medical evidence, including physicians' opinions (§ (a)(4)). A showing in any of the four categories leaves some or all of the three statutory elements of the claim for benefits unproved, but the presumption shifts the burden of persuasion on those elements to the mine operator or Director.

In the Director's view of this proof scheme, the claimant, in order to invoke the presumption under one of the Subsection (a) categories, must establish the fact or facts specified in that category (the

"basic" facts) by a preponderance of the specified type of evidence. Such a showing triggers a presumption of compensable disability, and the rebutting party then bears the burden of disproving the unproven elements of a valid claim to benefits (the "presumed" facts). Relitigation of the basic facts is foreclosed—with one infrequently used exception: to the extent there is any evidence other than the type used at invocation that is relevant to the basic facts, the rebutting party may seek to rebut the basic facts using such evidence.

The court of appeals construed the interim regulations to embody a different kind of proof scheme. The court held that the presumption is automatically invoked when the claimant introduces a single qualifying piece of evidence in one of the four Subsection (a) categories, no matter how greatly outweighed that piece of evidence is by other evidence within the same category. Apparently, however, the basic fact thus "established" at the invocation stage remains fully open for relitigation on rebuttal, with the burden of persuasion having shifted to the operator or Director. In the court's view, the presumption operates as an easy burden-shifting device, but does not establish separate stages for adjudicating distinct elements of a benefits claim.

II. The Director's view of the proof scheme created by the interim regulations gives meaning to the regulation's requirement that the claimant "establish" the basic facts in order to invoke the presumption, and it sets out an orderly method for litigating the several elements of a valid claim for benefits. It is also wholly consistent with statutory requirements and congressional intent and is in accord with, though not mandated by Section 7(c) of the Administrative Procedure Act (now codified at 5 U.S.C.

556(d)). It provides for consideration of "all relevant evidence," as required by the statute (30 U.S.C. 923(b)). And because the standards applicable to Part B claims require the claimant to prove the basic invocation facts by a preponderance of the evidence, the Director's similar reading of the Part C interim regulations fully reflects the congressional command that the interim regulations be no more restrictive than the Part B standards (30 U.S.C. 902(f)(2)).

The Director has consistently maintained that all like-kind evidence must be weighed at the invocation stage. Moreover, the Benefits Review Board has long adjudicated claims under the interim regulations in accordance with this view. For those reasons, and because the Office of Workers' Compensation Programs has been the agency responsible for administering the regulations from the time they were promulgated, the Director's view of the regulation is entitled to deference and should be adopted by this Court.

ARGUMENT

THE DIRECTOR'S READING OF THE INTERIM REGULATIONS SHOULD BE ACCEPTED BY THIS COURT

We think it important to note at the outset that our disagreement with the Fourth Circuit's ruling is not directed at the results it would produce in adjudicating particular claims for benefits. Although few claims have been adjudicated under the Fourth Circuit's standards, we have no reason to believe that those standards will produce results different from those of the Director's reading. The Director and the Benefits Review Board have long adhered to the "true doubt" rule, which requires that the claimant prevail on those issues as to which the evidence is in equi-

poise (see, *e.g.*, 43 Fed. Reg. 36826 (1978)); in view of that rule, the Director's requirement that the claimant prove the basic invocation facts by a preponderance of the evidence appears to have much the same effect as the Fourth Circuit's imposition of a preponderance burden on the rebutting party. The difference is that the Director's reading requires a weighing process at the invocation stage, whereas the court of appeals' reading requires it at the rebuttal stage. With doubts resolved in favor of the claimant under the Director's approach, it is difficult to see how this difference will change the outcome of specific cases.

The grounds for our disagreement with the court of appeals' ruling are that the sudden change of standards will greatly disrupt the adjudication of a large body of cases and that the court had no reason to reject the Director's position, which we think is the better reading of the admittedly ambiguous regulatory language and is entitled to judicial deference. See *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Thus, it is clear from the large number of remands that have already taken place (see Fed. Resp. Br. 14) that the Fourth Circuit's rejection of the long-followed standards will require relitigation of numerous claims in an already overburdened adjudicatory system. Because the Director's view is reasonable and avoids this apparently pointless disruption that the court of appeals' decision effects, the court of appeals' decision should be reversed.

A. The Director's view is a reasonable construction of the regulations

1. The regulatory language does not clearly and unambiguously define the claimant's burden at the

invocation stage. As Judge Phillips pointed out (see Pet. App. 46a-47a n.11), even a cursory reading of the regulation at issue, 20 C.F.R. 727.203, reveals that it is hardly a model of precise and unambiguous drafting. The regulatory language is, however, quite consistent with the Director's interpretation that, in determining whether the presumption is triggered, all of the evidence of the specified type must be weighed under a preponderance standard. Indeed, the regulatory language offers strong reason to prefer this reading to that of the court of appeals.

First, although Subsection (a)(1) speaks of "[a]" chest X-ray, biopsy, or autopsy establishing pneumoconiosis, the other three subsections all suggest that more than a single piece of evidence should be considered. Those provisions expressly use inclusive terms in describing the evidence to be considered—the plural "studies" in Subsections (a)(2) and (3);[16] the general "[o]ther medical evidence" in Subsection (a)(4). Likewise, even the reference to "the documented opinion of *a* physician" in Subsection (a)(4) (emphasis added) is made only in a context that seems to require that the opinion be considered along with "[o]ther medical evidence." Thus, use of a singular term in Subsections (a)(1) and (a)(4), if it is not simply the result of careless drafting, suggests only that a single piece of evidence *may* be sufficient to "establish" disease or impairment, not

[16] Use of the word "studies" in Subsections (a)(2) and (3) indicates consideration of more than one set of results. Although ventilatory function and blood gas studies do consist of a series of tests, the regulations on other occasions refer to such a series of tests as a single "study." See 20 C.F.R. 410.426(b) (referring to "a ventilatory study"); 20 C.F.R. 718.105(b) and (c) (referring to "a blood-gas study").

that a single item of evidence compels invocation of the presumption.

Most significant, each of the four subsections that define methods for invoking the presumption explicitly provides that a presumption of disability is invoked only if specified facts are "establish[ed]" (§ (a)(1), (2), and (4)) or "demonstrate[d]" (§ (a)(3)). This language strongly suggests a weighing process. For evidence to "establish" a fact, the evidence must be evaluated; and evaluation cannot occur in complete isolation from other relevant evidence. Thus, a single positive X-ray would not "establish" pneumoconiosis if other X-ray, biopsy, or autopsy evidence—for example, several negative X-rays taken more recently and read by more expert readers—convinced the trier of fact that pneumoconiosis was not likely to be present. The process of "establishing" the basic facts at the invocation stage is most reasonably construed to require weighing all other like-kind evidence—and doing so under the usual, preponderance-of-the-evidence standard.[17]

[17] At the Director's urging, the courts of appeals, including the court below, have unanimously concluded that the rebutting party meets its parallel obligation to "establish" its case under Subsection (b) only by proving by a preponderance of the evidence that the miner does not have pneumoconiosis, is not disabled, or is not disabled even in part as a result of coal mine employment. See Pet. App. 23a-25a (opinion of Hall, J.); *Amax Coal Co.* v. *Director, OWCP*, 801 F.2d 958, 963-964 (7th Cir. 1986); *Kaiser Steel Corp.* v. *Director, OWCP*, 748 F.2d 1426, 1430 (10th Cir. 1984); *Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 124 (4th Cir. 1984); *Alabama By-Products* v. *Killingsworth*, 733 F.2d 1511, 1513-1515 (11th Cir. 1984); *Consolidation Coal*

The court of appeals' interpretation of the regulation fails to account adequately for the use of the word "establish." It makes little sense to say that a fact is "established" at the invocation stage (*e.g.*, pneumoconiosis, under § (a)(1)) if the fact is fully open at the rebuttal stage for litigation with all like-kind evidence (*e.g.*, X-ray, biopsy, or autopsy evidence, for § (a)(1)). If any issue may be litigated, and any evidence may be considered, at the rebuttal stage, nothing is "established" at the invocation stage. Under the Fourth Circuit's view, all that is required is an X-ray *that has been interpreted* to "establish" pneumoconiosis. Such a construction is, at the very least, in tension with the regulatory language.

The linguistic awkwardness of the court of appeals' reading of the regulation is highlighted by a recent panel decision of the Fourth Circuit construing the decision below. In *Haynes* v. *Jewell Ridge Coal Corp.*, 790 F.2d 1113 (4th Cir. 1986), the court held that the presumption should have been invoked under Subsection (a)(1) where a number of X-rays had been interpreted as negative by all readers and a single X-ray had been interpreted as positive by two readers and negative by six. The court held that "[i]f a single *reading* of a qualifying X-ray indicates the presence of pneumoconiosis, the (a)(1) presumption is triggered" (790 F.2d at 1114 (emphasis added)), and "[c]onflicting interpretations"

Co. v. *Smith*, 699 F.2d 446, 449 (8th Cir. 1983). See also *Palmer Coking Coal Co.* v. *Director, OWCP*, 720 F.2d 1054, 1058 (9th Cir. 1983) (rebutting party "must produce sufficient evidence").

are to be considered on rebuttal (*ibid.*).[18] Thus, in the Fourth Circuit's view of the regulation, the medical evidence that invokes the presumption may in fact be wholly discredited and thus ultimately not even reliable, probative evidence of pneumoconiosis or impairment. Such evidence cannot reasonably be said to "establish" impairment or disease.[19]

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[18] A panel of the Sixth Circuit has explicitly disagreed with the method of analysis advanced by the Fourth Circuit in *Haynes*. In *Lambert* v. *Director, OWCP*, No. 85-3789 (Nov. 4, 1986), petition cert. pending, No. 86-6296, the Sixth Circuit, relying on its previous ruling in a Part B case, *Lawson* v. *Secretary of Health & Human Services*, 688 F.2d 436 (6th Cir. 1982), noted that to allow invocation on a single positive reading " 'would mean that a claimant could have an X-ray that has been read as negative repeatedly reread until he achieves a positive reading.' " *Lambert*, slip op. 4 (quoting 688 F.2d at 438). Accord, *Back* v. *Director, OWCP*, 796 F.2d 169, 171-172 (6th Cir. 1986).

[19] Those courts that have upheld the interim presumption against constitutional attack have done so because they found a rational connection between the proven facts—10 years' coal mine employment and simple pneumoconiosis or a significant respiratory impairment—and the presumed facts—totally disabling pneumoconiosis arising from coal mine employment. *Alabama By-Products Corp.* v. *Killingsworth*, 733 F.2d at 1516-1518; *Kaiser Steel Corp.* v. *Director, OWCP*, 757 F.2d 1078, 1083-1084 (10th Cir. 1985). See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 28-29 ("worth repeating" that statutory presumption, 30 U.S.C. 921(c)(1), is triggered only on "proof of pneumoconiosis"). It is unclear how one piece of disputed evidence—such as a single positive X-ray reading that is ultimately discredited by conclusive negative autopsy evidence—could provide a rational basis for presumptive eligibility to benefits. See, *e.g.*, *Lagamba* v. *Consolidation Coal Co.*, 787 F.2d 172 (4th Cir. 1986) (allowing invocation under Subsection (a)(1), as well as Subsection (a)(3), even though autopsy evidence was negative). The Fourth Circuit's reading of the interim regulations thus strains the constitutional basis for the presumption.

2. The Director's interpretation of his regulation sets out an orderly, sensible, and altogether usual method of considering "all relevant medical evidence" (Subsection (b)).[20] For each particular Subsection (a) category under which the claimant seeks to invoke the presumption, the ALJ examines all evidence, from both parties, of the type specified in that category. The ALJ must first ascertain whether any of the evidence meets certain standards of reliability. See note 7, *supra*. If such evidence exists, and is uncontroverted, the ALJ is compelled to invoke the presumption. Cf. *Ansel* v. *Weinberger*, 529 F.2d 304, 309 (6th Cir. 1976) (statutory presumption at 30 U.S.C. 921(c)(4)). If the evidence is controverted, the ALJ, like any other trier of fact, must focus on the relative weight to be accorded each piece of evidence. *Director, OWCP* v. *Rowe*, 710 F.2d 251, 254-255 (6th Cir. 1983); *Peabody Coal Co.* v. *Benefits Review Bd.*, 560 F.2d 797, 802 (7th Cir. 1977) (citing *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403, 405 (2d Cir. 1961), and *Todd Shipyards Corp.* v. *Donovan*, 300 F.2d 741 (5th Cir. 1982)).

[20] Contrary to the Fourth Circuit (Pet. App. 23a (opinion of Hall. J.)), the placement of this requirement at the beginning of the rebuttal section in no way suggests that weighing of evidence is excluded at the invocation stage. By its own terms, the requirement applies to the entire adjudication under the interim regulations, including both Subsections (a) and (b). Moreover, under any reading of Subsection (a), the evidence considered at the invocation stage is limited to that specified in the particular invocation category (*e.g.*, ventilatory studies under § (a)(2)); consideration of all remaining relevant evidence inevitably takes place at the rebuttal stage, and the command to consider *all* evidence is thus most sensibly placed in the rebuttal section of the regulation. Finally, the requirement was expressly included in the regulation in response to comments focused on the rebuttal stage. See 43 Fed. Reg. 36826 (1978) ("[t]he interim presumption is, by statute, rebuttable and the Department has no authority to make it irrebuttable").

A number of unsurprising evidentiary principles commonly enter into this weighing process. First, because pneumoconiosis is a progressive disease, a later qualifying X-ray, ventilatory study, or blood gas study generally deserves more weight than an earlier negative result. See *Consolidation Coal Co.* v. *Chubb*, 741 F.2d 968, 973 (7th Cir. 1984). Similarly, an X-ray interpretation by a certified expert in reading X-rays (a so-called "B"-reader) is usually more persuasive than an X-ray reading by a general practitioner. See *Sharpless* v. *Califano*, 585 F.2d 664, 666-667 (4th Cir. 1978); *Moseley* v. *Peabody Coal Co.*, 769 F.2d 357, 360 n.3 (6th Cir. 1985); *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 973. Likewise, a medical conclusion regarding disability, offered under Subsection (a)(4), is more probative if rendered by the claimant's treating physician or a pulmonary specialist than if rendered by any other doctor who has examined the claimant only once. The evidentiary value of a physician's opinion is also increased if it is based on objective tests and examination results. See 20 C.F.R. 410.471.

Once the threshold established by the presumption is crossed, the rebutting party bears the burden of disproving the "presumed" facts—the elements of a valid claim to benefits that have not been "established" at the invocation stage. The "basic" facts established to invoke the presumption, however, cannot be relitigated by use of the same kind of evidence considered at the invocation stage, since those facts are taken to be proved, and *all* evidence of the specified type has been weighed at the earlier stage. See,

e.g., Pet. App. 39a n.5 (opinion of Phillips, J.). For example, if a claimant has successfully invoked the presumption under Subsection (a)(4), he has necessarily proven by a preponderance of the medical evidence the presence of a totally disabling respiratory or pulmonary impairment. The rebutting party may then attempt to show that the disability is not due to coal mine employment (§ (b)(3)) or that the claimant does not have pneumoconiosis (§ (b)(4)). The rebutting party may also attempt to use *non-medical* evidence, such as evidence of actual comparable gainful work, to show that the miner is not disabled within the meaning of Subsections (b)(1) and (2). But *medical* evidence bearing on disability, having been considered once in connection with the issue of disability, will not be considered again on that issue (though, if relevant, it may be considered on the issues of pneumoconiosis and mine-relatedness). Similarly, if a claimant has invoked the presumption under Subsection (a)(1), he has proven that he suffers from pneumoconiosis by the weight of the X-ray, biopsy, and autopsy evidence.[21] The rebutting party can dispute disability (§ (b)(1) and (2)) or mine-relatedness (§ (b)(3)) but cannot seek to disprove the existence of pneumoconiosis (§ (b)(4)) solely on the basis of the kind of evidence specified in Subsection (a)(1).[22]

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[21] Contrary to the majority's conclusion below (Pet. App. 71a n.10 (opinion of Sprouse, J.)), if a claimant attempts to invoke the presumption under Subsection (a)(1) based on X-ray evidence, the ALJ, under the Director's approach, would consider biopsy or autopsy evidence showing that the claimant does not suffer from pneumoconiosis before the presumption is invoked. See *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 974.

[22] Based on current medical knowledge, X-ray, biopsy, and autopsy evidence are today the only reliable evidence for diagnosing pneumoconiosis. Therefore, after a Subsection (a)(1) invocation, the question of pneumoconiosis is effectively closed: the rebutting party cannot, as a practical matter, attempt to show that the miner does not suffer from some form of clinical pneumoconiosis. Other issues remain open. Thus, a physician's opinion on the *cause* of the clinical pneumoconiosis—*e.g.*, that the condition was caused by exposure to asbestos, cotton dust, or silica unrelated to coal mining—would certainly be admitted in rebuttal.

Contrary to the views of some of the judges below (see Pet. App. 21a (opinion of Hall, J.), 71a n.10 (opinion of Sprouse, J.)), this scheme excludes consideration of no relevant evidence; nor does it render the presumption irrebuttable. It simply allocates certain issues and evidence to the presumption stage and prohibits relitigation of the same issues based on the same evidence. Similarly, the proof scheme in no way eliminates the substantial advantages to claimants that presumptions afford, as the majority below believed (Pet. App. 70a, 77a-83a (opinion of Sprouse, J.), 94a (opinion of Widener, J.)). A claimant invokes the presumption without establishing each and every element of entitlement to benefits. Rather, for each of the categories of Subsection (a), the claimant proves only certain facts with only certain evidence (*e.g.*, pneumoconiosis under § (a)(1) with X-ray, biopsy, and autopsy evidence). At the rebuttal stage, the presumed facts (*e.g.*, disability and mine-relatedness, in the case of a § (a)(1) presumption) are open, but the burden of proof is shifted. The basic facts remain open only to the extent there is relevant evidence different in kind from that offered at the presumption stage. See Pet. App. 39a n.5 (opinion of Phillips, J.). Under this proof scheme, all evidence is considered in an orderly sequence, and proof of different elements of a valid

claim for benefits is clearly allocated to two different stages, with claimants relieved of the burden of proof at the second stage.[23]

This allocation of issues to the two stages of the presumption-rebuttal proof scheme has express support in the black lung statute itself. Under 30 U.S.C. 921(c)(4), a miner with 15 years' coal mine employment who "demonstrates the existence of a totally disabling respiratory or pulmonary impairment" is entitled to a presumption that he is totally disabled due to pneumoconiosis. That presumption may be rebutted "only by establishing" that the miner does not have pneumoconiosis or that his disability did not arise from coal mine employment. See, *e.g.*, *Ansel* v. *Weinberger*, 529 F.2d at 310. See also *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. at 51 (Stewart J., concurring in part and dissenting in part). The issue of disability is not open for relitigation on rebuttal. The interim presumption, under the Director's interpretation, works in much the same way.

The Director's interpretation of the interim presumption reflects common notions and practices concerning burdens of proof.[24] Recognizing that the allocation of burdens of proof on particular issues in particular lawsuits depends on considerations of "policy and fairness based on experience" (9 J. Wigmore, *Wigmore on Evidence* § 2486 (1981); E.

[23] As noted above (see page 15, *supra*), all issues appear to remain open on rebuttal under the court of appeals' reading of the regulations.

[24] The Federal Rules of Evidence do not apply to administrative black lung benefit proceedings. See 20 C.F.R. 725.455(b) and 33 U.S.C. 923(a), as incorporated by 30 U.S.C. (Supp. III) 932(a); *American Coal Co.* v. *Benefit Review Bd.*, 738 F.2d 387, 390-391 (10th Cir. 1984); *Alabama By-Products Corp.* v. *Killingsworth*, 733 F.2d at 1515.

Cleary, *McCormick on Evidence* § 345 (2d ed. 1972)), courts and legislatures have adopted many types of evidentiary devices, such as presumptions, prima facie showings, and affirmative defenses.[25] There is a class of presumptions that have been labelled "conditional imperatives," where if one party proves a particular fact, the burden of disproving a second fact shifts to the opposing party. See Allen, *Presumptions in Civil Actions Reconsidered*, 66 Iowa L. Rev. 843, 850-851 (1981). The Director's interpretation of the Part C interim proof scheme creates precisely that type of presumption, with one modification: because the regulation specifies the types of evidence to be considered as well as the facts to be proved at the invocation stage, those facts remain open after invocation to the extent (see note 22, *supra*) that there is relevant evidence other than the type considered at the first stage.

[25] See, *e.g.*, *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983) (under National Labor Relations Act, 29 U.S.C. (& Supp. III) 151 *et seq.*, plaintiff proves by a preponderance that defendant's discharge of plaintiff was motivated in part by plaintiff's protected activity; defendant may prove by a preponderance that same action would have been taken despite plaintiff's protected activity); *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) (under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.*, plaintiff proves prima facie case of employment discrimination by proving certain facts by a preponderance of the evidence; defendant produces evidence of nondiscriminatory motive; plaintiff must prove by a preponderance that defendant's articulated motive is pretext); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979) (under 25 U.S.C. 194, Indian proves previous possession of land; non-Indian must prove title).

B. The Director's interpretation of the interim regulations is consistent with statutory requirements and with congressional intent

1. The Director's interpretation of the interim regulations is wholly in accord with the two relevant statutory requirements of, as well as with the intent behind, the black lung statute. It plainly provides for consideration of "all relevant evidence * * * where relevant" (30 U.S.C. 923(b)). See also H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978) ("in determining claims under such criteria all relevant medical evidence shall be considered"). The difference between the Director's view and the Fourth Circuit's is not whether, but only where in the process, evidence is considered. In the Fourth Circuit's view, all but a single piece of qualifying evidence is considered at the rebuttal stage. In the Director's view, all evidence of the type specified in each Subsection (a) category is considered at the invocation stage and, if relevant to non-invocation issues, on rebuttal; and all other evidence is considered on rebuttal.[26]

The Director's interpretation also gives full effect to the requirement of the Black Lung Benefits Re-

[26] Unsurprisingly, the court of appeals did not assert that the Director's view violates the statutory prohibition against the Director's re-reading certain X-rays that have been read as positive (30 U.S.C. 923(b)). Although re-readings obtained by other parties are accepted as evidence, as are other X-rays, the Director does not re-read the statutorily specified qualifying positive X-rays. The Director's view also fully comports with the prohibition against denying a claim "solely on the basis of the results of a chest [X-ray]" (*ibid.*). Although all X-ray evidence is weighed, no claim is denied on the basis of a single negative X-ray. Nor is there any doubt that claimants are afforded the "opportunity to substantiate * * * claim[s] by means of a complete pulmonary evaluation" (*ibid.*).

form Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 96, that the interim regulations may "not be more restrictive" than the regulations governing claims under Part B of the program (30 U.S.C. 902(f)(2)). The very wording of this restriction makes clear that the requirement is satisfied by regulations modeled on those governing Part B claims and interpreted in a parallel fashion. The legislative history confirms this and, indeed, evinces a clear expectation that the Part C interim medical criteria would in fact be borrowed from Part B. Thus, the Conference Report (H.R. Rep. 95-864, *supra*, at 16) states that "the so-called 'interim' part B medical standards are to be applied to all reviewed and pending claims filed before the date the Secretary of Labor promulgates new medical standards." See also H.R. Rep. 95-151, 95th Cong., 1st Sess. 15 (1977). Moreover, in the House discussion of the Conference bill, Representative Perkins, the senior House member on the Conference Committee and the Chairman of the Committee that reported the original bill, stated that the Part B standards "will continue to apply into the future as well, until such time as the Secretary of Labor promulgates new regulations" (124 Cong. Rec. 3426 (1978)). See also 124 Cong. Rec. 3431 ((1978) (statement of Rep. Perkins) ("[a]s for the Labor Department, it too must apply the [Part B] interim standards to all of the claims filed under Part C, at least until such time as the Secretary of Labor promulgates new standards"); *ibid.* (statement of Rep. Simon).

In fact, the Part C interim regulations, and the Director's reading of them, are modelled on the Part

B regulations administered by the Social Security Administration (20 C.F.R. 410.490(b)).[27] Under both sets of regulations, proof of pneumoconiosis by X-ray, autopsy, or biopsy evidence or proof of a respiratory or pulmonary impairment by specified results on ventilatory function tests, combined with ten years' coal mine employment (or, in some cases, other specified evidence that the disease or impairment arose from coal mine employment), entitles a claimant to a rebuttable presumption of disability. 20 C.F.R. 727.203(a)(1) and (2), 410.490(b). In addition, the Part C medical criteria are, in some respects, more generous towards claimants than the Part B regulations. Thus, they allow claimants to invoke the presumption by proof of impairment as demonstrated by the results of blood gas studies or by

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[27] The Part B regulations utilized by SSA provide, among other things, that a miner will be presumed totally disabled due to pneumoconiosis if either "[a] chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis" or "[i]n the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease" and "[t]he impairment * * * arose out of coal mine employment." Ten years' coal mine employment gives rise to a rebuttable presumption that demonstrated pneumoconiosis arose from such employment. 20 C.F.R. 410.490(b)(2), 410.416, 410.456. The presumption is rebutted if "[t]here is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work" or "[o]ther evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work." 20 C.F.R. 410.490(c).

"other medical evidence" establishing a totally disabling respiratory or pulmonary impairment.

Most important for this case, it has long been clear that all like-kind evidence is weighed in determining invocation of the presumption available to Part B claimants under 20 C.F.R. 410.490(b). See, *e.g.*, *Vintson* v. *Califano*, 592 F.2d 1353, 1356-1359 (5th Cir. 1979); *Gober* v. *Matthews*, 574 F.2d 772, 775 (3d Cir. 1978); see also *Lawson* v. *Secretary of Health & Human Services*, 688 F.2d 436, 438-439 (6th Cir. 1982); *Hill* v. *Weinberger*, 430 F. Supp. 332 (E.D. Tenn. 1976); *Tonker* v. *Mathews*, 412 F. Supp. 823 (W.D. Va. 1976); *Zirkle* v. *Weinberger*, 401 F. Supp. 945 (N.D. W.Va. 1975). On at least one occasion, the Secretary of HEW plainly articulated his view that conflicting interpretations of a single X-ray must be weighed. *Hill* v. *Weinberger*, 430 F. Supp. at 334-335. Indeed, the Fourth Circuit itself recognized as early as 1978, the year the Part C interim regulations were promulgated, that a weighing of evidence takes place under Part B at the invocation stage. *Sharpless* v. *Califano*, 585 F.2d at 667. Agreeing that X-ray evidence should be weighed in establishing entitlement to the Part B presumption, the Fourth Circuit noted: "[w]e know of nothing in the Act * * * or * * * legislative history, to indicate that this fact is not required to be proved by a preponderance of the evidence as is every other fact which is not presumed." *Ibid.* Similarly, in *Pannell* v. *Califano*, 614 F.2d 391, 393 (1980), another Part B case, the Fourth Circuit stated that "[t]he claimant has the burden of proving his entitlement to the presumption under the regulations by a preponderance of the evidence." The Director's view of the Part C interim regulations simply follows this

Part B practice and thereby implements what Congress clearly intended when it authorized the regulations in 1978.

The Director's reading of the Part C interim regulations also gives full effect to the compensatory purposes of the black lung benefits statute, which was enacted to "provide benefits * * * to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease." 30 U.S.C. 901(a). As shown by the creation of certain statutory presumptions (30 U.S.C. 921(c)), which are not at issue here, and by the several restrictions on the use of unreliable negative X-ray evidence (30 U.S.C. 923 (b)), Congress intended miners to receive the benefit of the doubt in this medically-controversial area, even as it restricted benefits to those who, under reasonable evidentiary standards, could be shown to be actually disabled by mine-related pneumoconiosis.[28] Contrary to the Fourth Circuit's implicit conclusion, there is no reason to think that Congress believed that those legislative responses to the difficulties of medical proof were inadequate or that the interim presumption should be structured to furnish miners with additional assistance in proving their claims beyond the medical standards set by the Part B regulations.

[28] In 1977, the House Education and Labor Committee proposed that benefits should be awarded based solely on length of coal mine employment, with no evidence of disability or disease. See H.R. Rep. 95-151, *supra*, at 5. This proposal was not enacted. In addition, there was considerable debate in the 95th Congress over whether "simple" pneumoconiosis as established by X-ray evidence could ever be disabling. See *Alabama By-Products* v. *Killingsworth*, 733 F.2d at 1517-1518.

Under the Director's reading, the interim presumption allows certain miners to invoke a presumption of entitlement to benefits without proving all elements of a valid claim (pneumoconiosis, disability, mine-relatedness). Thus, a claimant with a minimum of 10 years' coal mine employment [29] shifts the burden of proof by establishing only certain aspects of his claim—pneumoconiosis (§ (a)(1)), a specified degree of respiratory or pulmonary impairment (§ (a)(2) and (3)), or a totally disabling respiratory or pulmonary impairment (§ (a)(4))—using certain specified types of evidence. That shifted burden must be carried by a preponderance of the evidence.

In addition to thus relieving the claimant of substantial proof obligations, the Director's approach also facilitates claimants' efforts to obtain benefits by following the "true doubt" rule. Where there is equally probative but contradictory evidence, doubt must be resolved in the claimant's favor. See, *e.g.*, 43 Fed. Reg. 36826 (1978); *Conley* v. *Robert & Schaefer Co.*, 7 B.L.R. (MB) 1-309 (Ben. Rev. Bd. 1984); *Provance* v. *United States Steel Corp.*, 1 B.L.R. (MB) 1-483 (Ben. Rev. Bd. 1978). As noted above, this rule, by mandating that close calls go to the claimant, makes it difficult to distinguish the Director's view from that of the Fourth Circuit in the

[29] The ten year employment requirement presumptively establishes that the proven disease or impairment arose from coal mine employment. See *Usery* v. *Turner Elkhorn*, 428 U.S. at 28-30. Two courts of appeals have concluded that a claimant with less than 10 years' coal mine employment may also invoke the interim presumption if he or she can otherwise prove the causation element. See *Halon* v. *Director, OWCP*, 713 F.2d 21 (3d Cir. 1983); *Coughlan* v. *Director, OWCP*, 757 F.2d 966 (8th Cir. 1985).

outcomes they will produce. The Director's view certainly satisfies congressional concerns for ameliorating evidentiary difficulties faced by miners seeking to establish entitlement to benefits.

2. The Director's interpretation of the interim presumption also conforms to the burden-of-proof requirements of Section 7(c) of the Administrative Procedure Act (APA) (codified at 5 U.S.C. 556(d)), as modified by the "true doubt" rule.[30] As recent decisions of this Court demonstrate, Section 7(c)[31] ad-

[30] Contrary to petitioners' argument, Section 7(c) of the APA, 5 U.S.C. 556(d), does not appear to apply of its own force to the Secretary's black lung regulations. Although the black lung statute (30 U.S.C. 932(a)) generally incorporates 33 U.S.C. 919(d), which in turn generally incorporates APA provisions, including Section 7(c), the black lung statute contains an express exception to this incorporation where "otherwise provided * * * by regulations of the Secretary" (30 U.S.C. 932(a)). In addition, the first sentence of Section 7(c) itself begins "[e]xcept as otherwise provided by statute * * *." Those exceptions, together with the broad authorization to promulgate appropriate regulations (30 U.S.C. 902(f)), give the Secretary, and hence the Director, authority to depart from APA standards.

Nevertheless, the Secretary has elected to incorporate certain provisions of the APA, not expressly including Section 7(c), into his regulations governing hearings on black lung claims. See 20 C.F.R. 725.452(a), 725.455(b), 727.109(a). Moreover, we think it relevant to the reasonableness of the Director's view that it conforms to generally applicable APA requirements.

[31] The section provides, in relevant part, that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof. * * * A sanction may not be imposed or rule or order issued except on consideration of the whole record * * * and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. 556(d).

dresses two separate questions: the burden imposed upon the proponent of a particular order; and the quantity of evidence necessary to sustain an agency's decision, whether it is favorable or unfavorable to the proponent. On the first question, Section 7(c) requires that the party advocating a particular result bear only a burden of production. *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 403-404 n.7 (1983). On the second question, Section 7(c) requires that the agency's decision, following an evidentiary hearing, be based upon a preponderance of the evidence. *Steadman* v. *SEC*, 450 U.S. 91, 95-106 (1981). See generally *Attorney General's Manual on the Administrative Procedure Act* 75-77 (1947).

The Director's interpretation of his regulations meets both of those requirements. Both the claimants and the rebutting parties bear a burden of persuasion, and hence at least the required burden of production, with respect to the facts that they must prove. The ALJ decision on each of the facts at issue must, in turn, be supported by a preponderance of the evidence, as modified by the "true doubt" rule.[32]

[32] The Fourth Circuit's construction of the interim presumption appears to meet APA requirements as well. In that view, the claimant bears a burden of production at the invocation stage, and the rebutting party bears a burden of persuasion. The ALJ's decision on each requisite fact must be supported by a preponderance of the evidence, as modified by the "true doubt" rule.

If the Fourth Circuit's view on invocation were combined with a restrictive view of what rebuttal evidence is admissible, such as the principles articulated in the now-overruled *Hampton* and *Whicker* decisions, the standards might violate Section 7(c)'s requirement that ALJ decisions be supported by the weight of the reliable and probative evidence.

C. The Director's view has been consistently maintained and represents long-standing administrative practice

1. The Benefits Review Board has, with a single exception,[32] consistently reviewed ALJs' determinations regarding invocation of the presumption under a preponderance standard. See, *e.g.*, *Elkins* v. *Elkhorn Corp.*, 2 B.L.R. (MB) 1-683 (Ben. Rev. Bd. 1979) (§ (a)(1)); *Struko* v. *Ziegler Coal Co.*, 3 B.L.R. (MB) 1-136 (Ben. Rev. Bd. 1981) (§ (a)(2)); *Lessar* v. *C.F. & I. Steel Corp.*, 3 B.L.R. (MB) 1-63 (Ben. Rev. Bd. 1981) (§ (a)(3)). Similarly, prior to the Fourth Circuit decision in this case, the courts of appeals had routinely reviewed for substantial evidence the factfinder's conclusion that a preponderance of a certain type of evidence supported the presumption. See, *e.g.*, *Back* v. *Director, OWCP*, 796 F.2d 169, 172 (6th Cir. 1986) (citing cases); *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 972-974; *Bozick* v. *Consolidation Coal Co.*, 735 F.2d 1017 (6th Cir. 1984), vacating 732 F.2d 64 (6th Cir. 1984); *Consolidation Coal Co.* v. *Sanati*, *supra*; *Markus* v. *Old Ben Coal Co.*, 712 F.2d 322, 326-327 (7th Cir. 1983). Thus, it is the Fourth Circuit's reformulation of the evidentiary standard, and not the Director's interpretation of his regulations, that represents a

[32] In *Stiner* v. *Bethlehem Mines Corp.*, 3 B.L.R. (MB) 1-487 (Ben. Rev. Bd. 1981), the Board concluded that the presumption must be invoked under Subsection (a)(4) if a single reasoned medical opinion establishes the presence of a totally disabling respiratory or pulmonary impairment. The Board subsequently overruled that decision, *Meadows* v. *Westmoreland Coal Co.*, 6 B.L.R. (MB) 1-773 (Ben. Rev. Bd. 1984), persuaded by the Fourth Circuit's reasoning in *Consolidation Coal Co.* v. *Sanati*, *supra*.

departure from long-standing administrative practice. That is why the decision below would require such extensive relitigation of pending claims.[34]

2. The Fourth Circuit erred in concluding (see note 14, *supra*) that the Director had at one time generally adhered to the court of appeals' construction of the presumption. The Director's policy, since the promulgation of the interim criteria in 1978, has been that all like-kind evidence must be weighed in determining whether a claimant has met one of the four medical evidentiary requirements specified in Subsection (a) and is therefore entitled to invoke the presumption.[35] Indeed, as the court of appeals should

[34] Application of the Fourth Circuit's interpretation of the interim presumption to all pending claims would greatly burden the administrative system and would require administrative reconsideration of a substantial number of cases. The Office of Workers' Compensation Programs estimates that at least 10,000 of the 25,000 pending black lung cases involve the interim presumption. There are currently over 200 black lung cases pending in the courts of appeals, and most of them involve the interim regulations. The Fourth Circuit and the Benefits Review Board together have already remanded at least 80 cases for reconsideration in light of the new Fourth Circuit standard.

The Third Circuit has also recently issued a panel decision that agrees with the Fourth Circuit's view. See *Revak* v. *National Mines Corp.*, 808 F.2d 996 (3d Cir. 1986). By contrast, the Sixth Circuit has rejected the Fourth Circuit's view. *Back* v. *Director, OWCP*, 796 F.2d at 172; *Engle* v. *Director, OWCP*, 792 F.2d 63 (1986). The Seventh Circuit appears to take a position different from that of the Third, Fourth, or Sixth Circuits. See *Amax Coal Co.* v. *Director, OWCP*, 801 F.2d at 962; *Kuehner* v. *Ziegler Coal Co.*, 788 F.2d 439, 449 (1986).

[35] The majority's observation (Pet. App. 62a (opinion of Sprouse, J.)) that the Secretary considered and rejected "a proposed provision requiring the weighing of all medical test evidence to invoke the presumption" is beside the point. The

have been aware, the Director had successfully urged adoption of the preponderance standard under Subsection (a)(4) in *Consolidation Coal Co.* v. *Sanati*, *supra*, in 1982.

Contrary to the Fourth Circuit's assertion (see note 14, *supra*), the Secretary's comments issued in connection with the promulgation of the interim criteria (43 Fed. Reg. 36826 (1978)) do not undermine the Director's view or reduce the deference owed to it. The purpose of the comments was to explain, in a balanced if somewhat opaque manner, the dual point that, while no relevant evidence would be excluded from consideration in rebuttal, doubts would be resolved in favor of the claimant. Thus, the Secretary first noted that the Department could not make the presumption irrebuttable by singling out certain positive evidence and overlooking other relevant evidence: "[T]he Department cannot, as has been requested by some, look for the single item of evidence which would qualify a claimant on the basis of the interim presumption, and ignore other previously obtained evidence." *Ibid.* The Secretary then stressed, on the other hand, that this refusal to overlook relevant negative evidence would not alter the fact that the process would be tilted in favor of miners' claims (*ibid.*):

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proposed regulation would have required the adjudicator to consider all medical evidence of disability together rather than in the separate categories, such as ventilatory or blood gas studies or medical opinions, recognized by the interim presumption. It thus would have imposed a substantially greater burden on claimants than the regulation that was adopted. See Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869, 896 n.138 (1981).

> This does not mean that the single item of evidence which establishes the presumption is overcome by a single item of evidence which rebuts the presumption. The Act embodies the principle that doubt is to be resolved in favor of the claimant, and that principle plays an important role in claims determinations both under the interim presumption and otherwise.

These remarks thus both demonstrate that the rebutting party bears the burden of persuasion and state the "true doubt" rule—where equally probative but contradictory evidence is present, doubts are resolved in favor of the claimant. See, *e.g.*, *Conley* v. *Roberts & Schaefer Co.*, 7 B.L.R. (MB) at 1-312; *Kozele* v. *Rochester & Pittsburgh Coal Co.*, 6 B.L.R. (MB) 1-378 (Ben. Rev. Bd. 1984); *Lessar* v. *C.F. & I. Steel Corp.*, 3 B.L.R. (MB) 1-63 (Ben. Rev. Bd. 1981). Read in context, and in light of the consistent statements of the Director and practice of the Benefits Review Board since 1978, the Secretary's comments do not call for the Fourth Circuit's view that the presumption is necessarily invoked with one piece of evidence.[36]

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[36] In addition, there is evidence from the Secretary's promulgation of the regulations that tends to contradict the Fourth Circuit's view. First, the Secretary noted that another section of the interim regulations (20 C.F.R. 727.206), which deals with quality standards applicable to X-rays, was "not intended to suggest whether a particular X-ray is sufficient to satisfy the interim presumption." 43 Fed. Reg. 36828 (1978).

Second, the Secretary agreed to delete a provision of the proposed version of 20 C.F.R. 727.206 that seemed to permit "the consideration of any other relevant evidence including other X-rays and X-ray interpretations in determining the presence or absence of pneumoconiosis" (43 Fed. Reg. 17771 (1978)). If read, as its language suggests, to be applicable to

CONCLUSION

The decision of the court of appeals should be reversed, and the case should be remanded with instructions to reconsider the administrative decisions under the proper legal standard.

Respectfully submitted.

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MARCH 1987

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the invocation stage, the proposed provision would flatly contradict the Fourth Circuit's reading of 20 C.F.R. 727.203. Yet no mention was made of the problem: the sole reason given for deleting the provision was that it had been "incorrectly interpreted to mean that the Department would reinterpret X-rays" covered by the statutory prohibition against rereading. 43 Fed. Reg. 36828 (1978). This silence suggests that the Fourth Circuit's reading of 20 C.F.R. 727.203 was not intended or perhaps even contemplated at the time of promulgation.

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No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY AND JEWELL RIDGE COAL CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENT LUKE R. RAY

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QUESTIONS PRESENTED

1. Whether the interim presumption as set forth at 20 C.F.R. 727.203(a) is triggered automatically by the introduction of one piece of qualifying medical evidence.

2. Whether the burden of proof under 20 C.F.R. 727.203(a) is controlled by the Administrative Procedure Act or the regulation itself as promulgated by the Secretary of Labor.

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OPINIONS BELOW

The Respondent, Luke R. Ray, hereby adopts the citations to the opinions delivered in the court below as set forth in Petitioner's brief at page 1.

JURISDICTION

The Respondent, Luke R. Ray, hereby adopts the grounds of jurisdiction of this Court as set forth in Petitioner's brief at page 2.

STATUTES AND REGULATIONS INVOLVED

The Respondent, Luke R. Ray, hereby adopts the Statutes and Regulations Involved in this case as set forth in Petitioner's brief at pages 2-5.

STATEMENT OF CASE

The Respondent, Luke R. Ray, is a former miner who filed a claim with the Secretary of Labor for black lung benefits. At the hearing on his claim, medical evidence was introduced which included one positive X-ray and two positive ventilatory studies. Despite this evidence, the administrative law judge concluded that the interim presumption under 20 C.F.R. 727.203(a) had not been triggered after weighing other negative studies, denied the respondent benefits, and the Benefits Review Board affirmed. The Fourth Circuit subsequently consolidated respondent's case with those of the other non-federal respondents and heard them en banc. Upon review of several prior decisions to the contrary, the court held that the interim presumption under subsection 203(a) is triggered by one item of qualifying medical evidence. The respondent seeks an affirmance of the Fourth Circuit's holding as the proper construction of the regulation.

The respondent hereinafter adopts the statement of the case as set forth in the brief for the federal respondent beginning with the first numbered subheading entitled "Statutory and Regulatory Framework" on page 2 and running to page 14. Exception is taken, however, to the third line of page 4 which should read ". . . unlike the Part B regulations. . . ."

The respondent takes exception to much of the petitioner's statement of the case, which is more in the form of argument, but will reserve his response for the argument section of his brief.

SUMMARY OF ARGUMENT

Congress, in authorizing the Secretary of Labor to promulgate the interim presumption now codified as 20 C.F.R. 727.203, directed the Department of Labor to consider all relevant evidence in adjudicating black lung claims under its regulations. The purpose of the directive was to prevent the Department of Labor from treating the presumption as irrebuttable. In promulgating 20 C.F.R. 727.203, the Secretary of Labor gave effect to that directive while giving every indication that the presumption could still be invoked much as it was under claims filed with SSA—by a single item of qualifying evidence. The Fourth Circuit gave such a construction to the regulation and should thus be affirmed.

The Fourth Circuit's interpretation of the interim presumption does not violate the Administrative Procedure Act because the Black Lung Benefits Act at 30 U.S.C. 932(a) allows exceptions to the act by regulation of the secretary and, further, the evidence of record is considered by the preponderance of the evidence rule prior to the administrative law judge's decision under 20 C.F.R. 727.203(b).

ARGUMENT

I

THE FOURTH CIRCUIT'S INTERPRETATION OF THE INTERIM PRESUMPTION IS CONSISTENT WITH THE PLAIN LANGUAGE AND INTENDED PURPOSE OF THE REGULATION.

The Fourth Circuit has given the interim presumption under 20 C.F.R. 727.203 a common sense construction and rejected the Director's interpretation of this regulation as internally inconsistent and contrary to its intended purpose. That the Director's proposed preponderance of the evidence standard for invocation of the presumption violates the purpose and plain language of the regulation is evidenced by both the legislative history leading to passage of the Black Lung Benefits Reform Act of 1977 (the "1977 amendments") (authorizing promulgation of the Part C interim regulations) and, more specifically, the comments of the Secretary of Labor issued in connection with the regulation's final promulgation. Together, these sources demonstrate that "[t]he Secretary [of labor] designed section 203(a) to give the coal miner the liberal advantages mandated by Congress. . ." as that section has been construed by the court below. *Stapleton* v. *Westmoreland Coal Co.*, 785 F.2d 424, 452 (4th Cir. 1986) (en banc) (Judge Sprouse).

At its inception, Title IV of the Federal Coal Mine Health and Safety Act of 1969 was considered an unusual piece of legislation in singling out the victims of one industry for compensation for an occupational disease. Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Session, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173) As Amended Through 1974 Including Black Lung Amendments of 1972* (Comm. Print Aug.

1975) at 522. The disease—pneumoconiosis, commonly known as black lung—was, however, recognized as probably the worst occupational disease in the country. *Id.* at 523. It soon became apparent that, in light of such a dramatic problem, Congress intended Title IV to provide a liberal system of benefit payments to the victims of black lung.

Such congressional intent was made most obvious in 1972 when Congress expanded the coverage of the program by amending the 1969 Act with the Black Lung Benefits Act of 1972 (the "1972 amendments"). Congress passed the 1972 amendments in response to the Social Security Administration's (SSA) eligibility criteria devised and promulgated by SSA for determining totally disabling pneumoconiosis pursuant to the 1969 Act. *See generally* S. REP. NO. 743, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2305 [hereinafter cited as S. REP. NO. 743]; *see also* Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W.Va. L. Rev. 869, 870, 871 (1981). By 1972 the denial rate was more than 50% nationwide under the SSA criteria. S. REP. NO. 743 at 2307. Such a result was unacceptable by Congress in that "countless miners and their survivors who were intended beneficiaries of the Black Lung program" were in fact being denied benefits. *Id.* In short, Congress had expected, under the 1969 Act, a more complete solution to the problem. *Id.*

The implied directive in the Senate Report on the 1972 amendments was, therefore, that SSA use its rulemaking authority to improve upon its black lung approval rate. *See* Solomons, *supra* at 870, 871. SSA was also then presented in that report with the expectation of Congress

that SSA adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt review of thousands of claims previously denied. S. REP. NO. 743 at 2322.

SSA's response was the promulgation of what has come to be known as the "interim presumption." 20 C.F.R. 410.490. The SSA presumption, while made applicable to Part B claims only, would serve as the model for the presently contested Part C interim presumption promulgated by the Secretary of Labor. Like the interim presumption under Part C, the Part B interim presumption was divided into two parts, the first governing invocation of a presumption of total disability due to pneumoconiosis upon the establishment of certain medical and employment requirements with the second governing rebuttal of the presumption. 20 C.F.R. 410.490(b) and (c). The rate of approval of SSA claims increased steadily under this regulatory scheme. *See* DEPT of H.E.W., S.S.A., 2d ANN. REP. TO THE CONGRESS ON THE ADMINISTRATION OF THE BLACK LUNG BENEFITS ACT OF 1972 (1977).

In light of the success of the SSA presumption, at least from the claimant advocates' point of view, calls began to mount for the Department of Labor to adopt the presumption for use in the adjudication of Part C claims. Solomons, *supra* at 884. The rate of claims approved by the Department of Labor, which began its adjudication of Part C claims in July 1, 1973, was significantly below that of SSA. *Id.* at 873. The inapplicability of the SSA presumption to Department of Labor claims was recognized as perhaps the most significant factor accounting for the disparity. *Id.*

Congressional support for the expanded use of the interim presumption grew during the period from 1974 to

1977. *Id.* at 887. However, by the time the 1977 amendments were proposed, some members of Congress were becoming increasingly critical of the interim presumption as allegedly used by SSA. The allegation was that SSA was not considering any other evidence once the presumption was invoked, thus effectively using the presumption "not as a screening device to separate approvable claims from potential denials, but as an irrebuttable presumption which would permit the approval of large numbers of marginal claims with a minimum of effort and without full adjudication." *Id.* at 889, 890. The regulatory scheme was, not doubt, conducive to such a practice given the fact that:

> The presumption is extremely easy to invoke and by its terms permits an inference of critical facts which are not, medically speaking, justified by the invoking evidence. For example, it is well accepted that a chest radiograph showing early stage simple pneumoconiosis does not demonstrate a disabling respiratory impairment. Yet, under the presumption, a totally disabling impairment is presumed from this evidence alone.

Id. at 880 (footnotes omitted).

The version of the 1977 amendments that ultimately became law was the product of a conference committee compromise. Under the compromise, the Department of Labor would adopt an interim presumption much like that used by SSA, but would also begin to develop new medical eligibility regulations which would eventually supersede the interim presumption. *Id.* at 893. Furthermore, to insure that the Department of Labor would not engage in the alleged practice of SSA in adjudicating black lung claims, the legislation would contain the following mandate:

> In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials.

30 U.S.C. 923(b).

The Conference Report on the 1977 amendments explains that:

> With respect to a claim filed or pending prior to the promulgation of such [new] regulations such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the *Federal Register.*

H.R. Rep. No. 864, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 308, 309. Thus, "[b]y this [Conference Report] statement, the conferees alerted the Secretary of Labor that he was not to treat the interim presumption as irrebuttable." Solomons, *supra* at 893.

The Department of Labor's interim presumption codified at 20 C.F.R. 727.203(a) and (b) was published as a proposal on April 25, 1978. 43 Fed. Reg. 17732, 171770-71 (1978) (Notice of Proposed Rulemaking). The regulation was then adopted and published in final form without a single change on August 18, 1978. 43 Fed. Reg. 37662, 36825-26 (1978) (Notice of Final Rulemaking). Significantly, congressional staff had struck from an earlier

draft of the regulation a proposed provision requiring the weighing of all medical test evidence to invoke the presumption. *See*, Solomons, *supra* at 896. In the final publication, the Secretary of Labor responded to numerous comments concerning the application of the controversial "all relevant evidence" rule. The Secretary's response bears repeating at length:

> The many comments which urge that all relevant evidence should not be considered in rebutting the interim presumption must also be rejected. The Conference Report accompanying the 1977 Reform Act provides, in connection with the interim criteria, 'except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the FEDERAL REGISTER. . . .'
>
> Some of the commentators felt that the 'all relevant evidence' rule would cause claims adjudicators to ignore the presumption, and simply pick from all the evidence those items on which they wish to rely. This is certainly not authorized by the interim presumption. However, the Department believes that use of the presumption should be clarified.
>
> The interim presumption is, by statute, rebuttable and the Department has no authority to make it irrebuttable. Nor does the Department have authority to exclude any relevant evidence from consideration in connection with any case, or mandate a result which is contrary to the evidence in a case. However, the Department cannot, as has been requested by some, look for *the single item of evidence which would qualify a claimant on the basis of the interim presumption*, and ignore other previously obtained evidence. This does not mean that *the single item of evidence which establishes the presumption* is overcome by a single item of evidence

> which rebuts the presumption. The Act embodies the principle that doubt is to be resolved in favor of the claimant and that principle plays an important role in claims determinations both under the interim presumption and otherwise.

433ed. Reg. at 36826 (Emphasis added).

The Secretary's response clearly implies that one item of qualifying evidence would be sufficient to invoke the interim presumption with the presumption of total disability subject to rebuttal, whereupon all relevant evidence would be considered. Such a construction of the regulation is totally consistent not only with the historically liberal congressional attitude towards the black lung benefits program as described above, but with the structure and language of the regulation as well. First, as the court below observes, nothing in subsection 203(a) "permits—much less requires" the weighing of conflicting evidence before the presumption may be invoked. *Stapleton*, 785 F.2d at 434 (Judge Hall). Rather, the presumption is subject to be triggered by the production of either *a* chest roentgenogram (X-ray) or the documented opinion of *a* physician which meets certain regulatory requirements of authenticity and reliability, or by the production of either ventilatory studies or blood gas studies which meet the regulatory standards for how such studies are to be conducted.[1] 20 C.F.R. 727.203(a)(1)-(4). Second, the requirement that all relevant medical evidence shall be considered only appears in subsection 203(b) governing the rebuttal phase of the regulatory scheme. To incorpo-

[1] It should here be noted that the petitioner is clearly wrong in stating that the Fourth Circuit held that "any" evidence "will do" to invoke the presumption. As the court held, *Stapleton*, 785 F.2d at 426, the evidence must qualify as the regulations require. *See* 20 C.F.R. 410.428, 410.440, 718.102-718.105, 727.206(a).

rate the "all relevant evidence" rule back into subsection 203(a), as the Director would have this Court to do, strains the logical reading of the regulation.[2] As Judge Sprouse stated:

> It is easy to fault legislative draftmanship, but if, [as the court held], the drafters of this regulation intended only one X-ray to trigger the presumption, I cannot think of a better or simpler way of saying it. On the other hand, to hold that the drafters intended a preponderance standard to apply would be to accept a section 203(a)(1) as an example of intolerable drafting.

Stapleton, 785 F.2d at 453, 454.

Moreover, the practical effect of the Director's interpretation is to nullify the intended benefit of the interim presumption. Congress created Title IV as an unusually generous remedial program. Under the Fourth Circuit's construction of the regulation, the miner can raise the presumption of totally disabling pneumoconiosis with a minimum of evidence—evidence of less than total disability—and shift the burden of persuasion to the Director or coal operator to go forward under subsection 203(b) with rebuttal evidence disproving total disability due to pneumoconiosis. This procedure avoids placing on the miner, who can least afford it, the burden of responding, at least initially, to a plethora of medical evidence more

[2] In their briefs both the petitioner and the Director attempt to capitalize on the use of the word "establish" in subsection 203(a) in support of such a construction of this portion of the regulation. But as Judge Hall recognizes, "establish" as used in subsection 203(a) "simply means that the claimant must prove at least one of the factual prerequisites to invoke the presumption, i.e., one qualifying X-ray, one set of qualifying ventilatory or blood gas studies, or the documented opinion of one physician." *Stapleton*, 785 F.2d at 434.

easily generated by the operator. The Director's interpretation of subsection 203(a), however, in calling for all the evidence to be weighed before invocation of the presumption, "renders the rebuttal phase of the inquiry superfluous." *Stapleton*, 785 Fed.2d at 434 (Judge Hall).

The Director and petitioner attempt to defend the Director's interpretation as the long-standing administrative practice to which the courts should defer. Petitioner even goes so far as to state that "a weighing of all relevant evidence in the invocation phase" has been "the consistent and unwavering fifteen-year construction of the invocation provisions of the interim presumption by multiple Secretaries of HHS and Labor." Brief for the Petitioners, p. 33. Such an assertion should be taken as no more than a litigation position absent any statement of agency policy to that effect. The legislative history, in fact, indicts to the contrary. It was, as previously discussed, the allegations that SSA was not considering all the relevant evidence on application of the interim presumption that gave rise to the "all relevant evidence" rule to begin with in the 1977 amendments. Furthermore, in light of the Secretary of Labor's clear implication in promulgating the regulation that a single item of qualifying evidence would be sufficient to invoke the presumption, a position by the Department of Labor to the contrary would be clearly erroneous. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The Administrative Procedure Act, 5 U.S.C. 552(a) (1982), moreover, appears to dictate that deference be given an agency interpretation of general application only if it is published in the *Federal Register*. *See Stapleton*, 755 Fed. 2d at 450, 451 (Judge Sprouse).

In sum, the statutory purpose in directing the inclusion of the "all relevant evidence" rule as part of the Depart-

ment of Labor interim presumption was to prevent the Department from treating the presumption as irrebuttal. In promulgating 20 C.F.R. 727.203, the Secretary of Labor gave effect to that directive while giving every indication that the presumption could still be invoked much as it allegedly was under claims filed with SSA—by a single item of qualifying evidence. The Fourth Circuit's decision giving such a construction to the regulation should thus be affirmed.

II

THE FOURTH CIRCUIT'S INTERPRETATION OF THE INTERIM PRESUMPTION DOES NOT VIOLATE THE ADMINISTRATIVE PROCEDURE ACT.

A. Petitioners argue in their brief that Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d) requires the application of a preponderance of the evidence standard to the interim presumption invocation facts. The Black Lung Benefits Act, 30 U.S.C. 932(a) generally incorporates 30 U.S.C. 919(d), which in turn generally incorporates APA provisions including Section 7(c).

The petitioner states in his brief at page 37 that the general applicability of the APA in black lung claim proceedings is not in dispute. The respondent does not dispute that in some instances the APA is applicable, but under 30 U.S.C. 932(a), which is the section of the Black Lung Benefits Act which generally incorporates the APA, there is set forth an express exception to this incorporation where "otherwise provided . . . by regulations of the secretary." 30 U.S.C. 932(a).

Therefore, the statute that makes the APA applicable to the Black Lung Benefits Act clearly sets forth an

exception that if the secretary's regulations provide a different scheme then the APA would not be binding.

B. Even if the Administrative Procedure Act does apply to the interim presumption, the Fourth Circuit's holding in this matter does not violate the intent of Section 7(c) of the APA, 5 U.S.C. 556(d).

The petitioner in his brief cites from Section 7(c) of the APA, 5 U.S.C. 556(d),[3] which in part states "except as otherwise provided by statute, the opponent rule or order has the burden of proof. . . ." As the federal respondent points out in his brief at page 34 and 35, recent decisions of this court demonstrate that Section 7(c) addresses two separate questions: the burden placed upon the opponent of a particular order and the quantity of evidence necessary to sustain an agency's decision whether it is favorable or unfavorable to opponent. On the first question, Section 7(c) requires that the party advocating a particular result bear only a burden of production. *NLRB* v. *Transportation Management Corporation*, 462 U.S. 393, 403-404, note 7, 1983. On the second question, Section 7(c) requires that the agency's decision following an evidentiary hearing be based upon a preponderance of the evidence. *See Steadman* v. *SEC*, 450 U.S. 91, 95-106, 1981. *See generally* Attorney Gen.'s Manual on the Administrative Procedures Act, 75-77 (1947).[4]

Therefore, the Fourth Circuit's ruling in *Stapleton*[5] puts the burden of production on the claimant at the

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[3] Petitioner's brief, p. 41.

[4] Respondent, Luke R. Ray, quotes directly from federal respondent's brief at pages 34 & 35 because it sufficiently states Ray's position.

[5] *Stapleton* v. *Westmoreland Coal Co.*, 785 F.2d 424.

invocation stage and once that burden is carried the burden of persuasion is shifted to the Director or operator to rebut under section 20 C.F.R. 727.203(b). The regulation at 20 C.F.R. 727.203(b) provides that all relevant medical evidence shall be considered, therefore, prior to the administrative law judge rendering a decision, the preponderance of the evidence criteria is applied to all relevant evidence.

The respondent would point out to the court that the federal respondent supports the position of respondent, Luke R. Ray, on the effect of the APA preponderance requirements on the interim presumption, and opposes the petitioner's position.

CONCLUSION

The judgment of the Fourth Circuit, is a correct interpretation of the regulations set forth in 20 C.F.R. 727.203(a) and (b) and should be affirmed.

Respectfully submitted,

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No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY AND JEWELL RIDGE COAL CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON AND WESTMORELAND COAL COMPANY,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT GERALD R. STAPLETON

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QUESTION PRESENTED

Should the Employer or Director be allowed an unlimited search for negative re-readings of x-ray reports, thus giving them the "preponderance of the evidence" when the x-ray was initially read by a certified "B" reader (final reader)?

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I.

STATEMENT OF THE CASE

A claim for benefits was filed by Gerald R. Stapleton, July 31, 1975, under Part C of The Coal Mine Health & Safety Act of 1969 as amended, hereinafter called the "Act".

After proper preliminary proceeding, a hearing before an Administrative Law Judge was held on November 6, 1980. A Decision and Order denying benefits was entered on April 14, 1981.

Notice of Appeal of the Administrative Law Judge's Order was mailed by Mr. Stapleton on May 8, 1981. An appeal to Benefits Review Board was timely filed by Mr. Stapleton's counsel.

A Decision and Order was entered by the Benefits Review Board affirming the Administrative Law Judge's denial of benefits.

Mr. Stapleton duly filed his Notice of Appeal from the United States Department of Labor, Benefits Review Board, to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit Court of Appeals rendered an opinion on February 26, 1986, and denied a rehearing. From this decision, Mr. Stapleton has filed a motion to proceed *in forma pauperis*.

II.

SUMMARY OF THE ARGUMENT

The unlimited search for Doctors who will give "negative" opinions so as to obtain for the Employer and the Director a presumed "preponderance of the (THE NUMBER) of reports" thereby presumably giving them

the "preponderance of the evidence" which, in the first place is not true even in regular civil cases, and in the second place goes strictly contrary to the intent of Congress in passing the legislation should be stopped.

III.

ARGUMENT

1. The Court Of Appeals, In Upholding The Decisions Denying Benefits Under The Coal Mine Health And Safety Act Of 1969, Utterly Failed To Properly Apply The Law To The Facts In The Instant Case.

A. *The decisions below were clearly erroneous when Mr. Stapleton had worked in the coal mines, underground, for more than fifteen years so that the "Interim Presumption" arising under* 20 CFR Section 727.203(a) *statutorily applied to the claimant's case.*

20 CFR (Code of Federal Regulations) Section 727.203(a)(1) states:

Section 727.203 INTERIM PRESUMPTION

> *(a) Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years *will be presumed to be totally disabled due to pneumoconiosis*, or to have been totally disabled due to pneumoconiosis at the time of death, . . . if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (x-ray), biopsy or autopsy establishes the existence of pneumoconiosis (see Section 410.428 of this title):
>
> (2) Ventilatory studies [PFS] establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in Section 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	= or < FEF1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

Emphasis ours.

1. *A positive x-ray finding of CWP by a "B" reader is conclusive of the existence of pneumoconiosis in the claimant.*

Mr. Stapleton had clear evidence of pneumoconiosis by the report of clearly read x-rays taken of his chest as read and reported by Dr. Navani—a "B" reader (as established by NIOSH). That report showed Mr. Stapleton as suffering from CWP 1/0 t and 1/0 q.

In that regard, the ALJ said he would not credit Dr. Navani's report because Dr. Byer's report said that the x-rays that he took showed 0/1 p CWP—A call in which the Employer's doctor, Dr. Byers, was in essence saying that he did not think that there was CWP, *that there might possibly be CWP.*

The ALJ also referred to Dr. Franke's more recent x-ray rereading of Dr. Byers' x-ray in which Dr. Franke stated that it was his opinion that the x-ray was clear of all abnormalities.

In doing this, the ALJ held:

> Under subsection (b)(4), the employer will prevail if the employee does not have pneumoconiosis . . . Only Dr. Navani's Nov. 30, 1976 x-ray was positive for pneumoconiosis. I must weigh the more recent x-ray

> of Dr. John Byers . . . in which he found that there was essentially no evidence of pneumoconiosis . . .

The issue of whether the ALJ may ignore one positive x-ray reading by a so-called "B" reader in favor of one or more negative (or essentially negative) readings and using that as a basis for finding that the "Interim Presumption" is not applicable in favor of the Claimant in Black Lung cases has long ago been decided. *A positive finding by a "B" reader is conclusive of the existence of pneumoconiosis in the claimant. Whitman* v. *Califano*, 617 F.2d 1055 (4th Cir. 1980).

The reasoning behind this rule was probably best stated by Judge James C. Turk, Chief Judge of the United States District Court for the Western District of Virginia in an admittedly "Part B" black lung case, but one which interpreted the corresponding provisions under that part to Section 727.203(a)(1) under "Part C" of the act under which the instant case arises. *Stewart* v. *Matthews*, 412 F.Supp. 235 (W.D.Va. 1975).

In *Stewart (ibid)*, as in the case at bar, Dr. Navani, a "B" reader had made an earlier positive finding of 1/0 p CWP on reading one of the claimant's x-rays. Later readings, as in the case at bar, by other so-called "B" readers, held the claimant's x-rays did not show pneumoconiosis and the ALJ gave the credence to the later reports and refused to give Stewart the benefit of the presumption. There the Court held:

> *The Court has determined that the crux of the controversy in this case concerns the significance to be attached to the roentgrenographic (x-ray) readings and re-readings developed during the course of the administrative adjudication. Plaintiff contends that the x-ray evidence is sufficient to entitle him to the "Interim Presumption" of total disability due to*

> *pneumoconiosis. . . . The Secretary determined that the preponderance of the evidence weighs against such a finding.*

The earliest x-ray evidence to be considered consists of a report by Dr. William C. Barr dated Oct. 27, 1970. In that report, Dr. Barr noted absolutely no evidence of pneumoconiosis. . . . *Dr. Dodrill noted a complete absense of pneumoconiosis.*

* * * *

. . . Dr. Shiv Navani noted pneumoconiosis category 1/0 p.

. . . [T]he Law Judge then requested Dr. Bristol to re-read the film. . . .

* * * *

Dr. Bristol noted no evidence of pneumoconiosis. . . .

* * * *

In an opinion eventually adopted as the final decision by the Secretary, the Administrative Law Judge produced an opinion denying Mr. Stewart's entitlement to benefits.

* * * *

> *The Court takes judicial notice of the fact that . . . Dr. Navani was classified as a "B" reader. Thus under the regulatory provision [of 42 CFR Section 37.52, which provides that interpretations of "B" readers will be considered final, and further that an original reading by a "B" reader will preclude any reason for additional readings], Dr. Navani's initial reading should have been considered FINAL. . . . Certainly, if the Law Judge continues to seek re-readings ad infinitum, he will eventually come upon a conservative reader who will find the films to be negative. . . . Indeed the repeated re-reading of films is exactly the form of administrative "one-*

> *upmanship" discouraged by Congress as it enacted the '72 amendments to the . . . Act.* (See Rep. No. 92-743, 92nd Cong. 2d Session, (1972).] [Emphasis supplied]

This same result and holding was set forth in an even more similar case by this Honorable Court in the 1980 decision of *Whitman* v. *Califano*, 617 F.2d 1055 (4th Cir. 1980), and would be the controlling case law herein.

Thus, since a positive finding by a "B" reader is conclusive of the existence of pneumoconiosis in the claimant, and since the claimant herein clearly had such a positive finding, *it would have been error for the ALJ and the BRB to have failed to give the Appellant, Mr. Stapleton, the benefit of the "Interim Presumption" under the provisions of 20 CFR Section 727.203(a)(1).*

2. *Mr. Stapleton should have been given the benefit of the "Interim Presumption" under Section 727.203(a)(2).*

Mr. Stapleton should have been given the benefit of the "Interim Presumption" under Section 727.203(a)(2), *supra*, because, despite the multitudinous efforts of Westmoreland's doctor (Dr. Byers) to down play and discredit his own pulmonary function studies (which should never have been taken, considering Mr. Stapleton's recognized heart condition), *the PFS taken by Westmoreland's own doctor and introduced by Westmoreland, clearly show by an valid statistical method that Mr. Stapleton had pulmonary function studies which, if valid to be considered at all* (and the Appellant-Employer inferred that they should be accepted when that party introduced this evidence), *had to qualify Mr. Stapleton for the "Interim Presumption" under the provisions of Section 727.203(a)(2).*

In this regard, Mr. Stapleton, the Claimant in the case at bar, is 74.5" tall and weighs 155 pounds. Therefore,

under the "Interim Presumption" as set forth in Section 727.203(a)(2) *supra, he would qualify for the "Interim Presumption" if his FEV1 is equal to or less than 2.7 and his MVV is less than 108.*

Mr. Stapleton's medical records show by the employers' doctor, Dr. Byers, shows an *average FEV1* for all eight tests *of 2.23* and *an average MVV* for all eight tests *of 102.14*!

If, instead of using the statistical *average* as a method of trying to come to some comprehensible result from the Employer's doctor's improper testing of Mr. Stapleton, we use the statistical *means* as a method of trying to come to a comprehensible result from the Employer's doctor's improper testing of Mr. Stapleton, we find that the *mean FEV1 (i.e.*, the FEV1 for test #4 and test #5) *is 1.11 to 1.02*, and the *mean MVV is 70 to 87.*

Thus, under the Employer's own doctor's examination (if it is to be given any validity at all), and in spite of everything that that doctor could do to discredit his own test results, it is clear that Mr. Stapleton qualifies for the "Interim Presumption" if he but worked in the mines for a mere 10 years. He actually worked at least 15 years.

B. *The decisions below were clearly erroneous when there was no legally viable evidence to rebut the presumption.*

Once it is clear that Mr. Stapleton should have been given the benefits of the "Interim Presumption" which are specifically called for in the Act of Congress which required the payment of benefits for retired coal miners who are disabled to work in their last coal mine employment (or similar employment) and which are allowed specifically under 20 CFR Section 727.203(a)(1) & (2), then the only question remaining to determine whether the

decisions of the ALJ and the BRB (backing up that ALJ decision) were proper is to determine whether they properly found that the "Interim Presumption" had been rebutted.

20 CFR Section 727.203(b) sets forth the standards whereby the "Interim Presumption", once established may be rebutted. That section says:

> *(b) Rebuttal of Interim Presumption. In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:*
>
> *(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work . . .; or*
>
> *(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work . . .; or*
>
> *(3) The evidence establishes that the total disability of the miner did not arise in whole* or in part *out of coal mine employment, or*
>
> *(4) The evidence establishes that the miner does not have pneumoconiosis . . .*

To be read *in pari materia* with Section 727.203, is 20 CFR 410.422. That sections states in part:

Section 410.422 Determining total disability: General Criteria.

* * * *

(c) Whether or not the pneumoconiosis in a particular case renders . . . a miner totally disabled . . . is determined from *all the facts of the case . . .*

It is also to be read *in pari materia* with Section 410.426. That section states in part:

> *(a) Pneumoconiosis which constitutes neither an impairment listed . . . nor the medical equivalent thereof, shall nevertheless be found totally disabling if because of the severity of such impairment, the miner is . . . not only unable to do his previous coal mine work, but also cannot, considering his age, education and work experience, engage in any other kind of comparable and gainful work available to him in the immediate area of his residence . . . Medical impairments other than pneumoconiosis may not be considered.*

4. An x-ray read by Dr. Shiv Navani, *a certified "B" reader,* on November 30, 1976, indicated an increase in small nodular and linear densities throughout the lungs consistent with changes of CWP type t 1/0 and q 1/0 with combined profusion of 1/0. Note is also made of presence of peribronchial thickening in large bronchi and in hilar regions. (see App. p.3, 159).

5. Dr. S. K. Paranthaman, Director, Respiratory Disease Clinic, Lonesome Pine Hospital, Big Stone Gap, Virginia, stated that:

> *Lung markings are slightly accentuated and are suggestive of coal worker's pneumoconiosis, type t 1/0 and q 1/0 with combined profusion of 1/0 . . . PFT shows mild to moderate obstructive ventilatory abnormality and possible restrictive lung disease; . . . In summary, this patient has evidence of coal worker's pneumoconiosis and possible chronic bronchitis. supra* p.9.

6. The Employer's own doctor stated:

> *. . . there are increased bronchovascular markings at both bases that are somewhat irregular in nature and which have apparently been read as "p" sized irregular interstitial densities on previous readings for CWP. ibid.*

7. Even more important he said:

> *This patient does appear to suffer from a mild to moderate respiratory impairment manifest as a decrease in arterial oxygenation.*
>
> * * * *
>
> *There is an abnormality of arterial blood gases which is not fully explained and which might be associated with dyspnea on moderate exertion.* [emphasis supplied] *ibid.*

8. This same employer's doctor recognized that Mr. Stapleton had *no evidence of:*

> *. . . contact with tuberculosis, birds, or bird feces, asbestos filters, or other pulmonary pathogens.* [emphasis supplied.] *ibid.* (see App. p.179).

9. and he also recognized that:

> *He worked in the coal mines for 15 years from 1958-72 . . .* [AND] *. . . All of his work was underground* as a loader, cutter helper, shuttle car operator, and as general underground utility and on the beltlines. His last job was as a utility man and most particularly driving a shuttle car. [emphasis supplied] *ibid.*

There was really no evidence upon which a rebuttal could be based:

First, there was absolutely no evidence relative to the physical demands of Mr. Stapleton's last prior coal mine employment, and so there was *no evidence to show that the job did not in fact require the same "moderate exertion" that Westmoreland's own doctor had reported would be "associated with dyspnea." supra* p. 9. If his job required such exertion then clearly he could not physically carry out the requirements of that job. If it did not, then maybe he could, but the Employer, who certainly had it in their ability to produce such evidence failed to do

so, and certainly neither they nor the ALJ can say that the "Interim Presumption" was rebutted in this case.

Secondly, there was no evidence concerning the environmental condition under which Mr. Stapleton would have to work if he re-assumed his former job or one of a similar nature in the immediate area of his residence. Could he work under those conditions, considering his pulmonary respiratory condition? That question would have to be answered before anyone could reasonably say that the "Interim Presumption" had been rebutted. *We must remember that* "disability must be determined from all of the facts of the case . . .", and where the presumption is in favor of the Claimant, the ABILITY must also be determined from all of the facts.

It does not do in rebutting a presumption to say that he has other medical problems. 20 CFR Section 410.426(a) specifically states that "medical impairments, other than pneumoconiosis may not be considered." If this be true in establishing disability, it must also be true in rebutting disability. Furthermore, other regulations specifically say that negative x-rays and non-qualifying PFS tests and non-qualifying blood gas studies may not be used solely as the basis for denying benefits of rebutting the presumption.

CONCLUSION

For the reasons stated, it is respectfully submitted that in the case at bar, the ALJ and the BRB, in its upholding of the ALJ's decision denying benefits under the Coal Mine Health and Safety Act of 1969, utterly failed to properly apply the law to the facts in the instant case because:

A. *The decisions below were clearly erroneous when Mr. Stapleton had worked in the coal mines, under-*

ground, for more than fifteen years so that the "Interim Presumption" arising under 20 CFR Section 727.203(a) *statutorily applied to the Claimant's case since:*

1. A positive x-ray finding of CWP by a "B" reader is conclusive of the existence of pneumoconiosis in the claimant,

2. Mr. Stapleton should have been given the benefit of the "Interim Presumption" under Section 727.203(a)(2) *and because;*

B. *The decisions below were clearly erroneous when (under the recent decisions of this Honorable Court) there was no legally viable evidence to rebut the Interim Presumption.*

Respectfully submitted,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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October 6, 1987

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Respondents.

PETITIONERS REPLY BRIEF

INTRODUCTION

This case presents a conflict among the circuits[1] concerning the quantum of proof required to invoke the black lung interim presumption, 20 C.F.R. § 727.203 (1986). Petitioners ("Mullins")

1. The Third and Fourth Circuits continue to adhere to the rule that any single item of invocation evidence automatically invokes the presumption. The Sixth Circuit required proof of any invocation fact by a preponderance in *Back* v. *Director, Office of Workers' Compensation Programs*, 796 F.2d 169 (6th Cir. 1986), but later expressed uncertainty over application of a preponderance standard to invocation by medical opinion evidence, 20 C.F.R. § 727.203(a)(4). *Patton* v. *National Mines Corp.*, 825 F.2d 1035, 1037 (6th Cir. 1987). More recently, the Sixth Circuit seems to have resolved its uncertainty by holding clearly that the preponderance standard applies to invocation. *Prater* v. *Hite Preparation Co.*, No. 86-3653 (6th Cir. Sept. 22, 1987).

The Seventh Circuit affirmed single-item invocation in *Amax Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 801 F.2d 958, 962 (7th Cir. 1986). In a later case, however, the court stated that "[claimant] asks us to . . . fall in line with the Fourth Circuit's decision in *Stapleton*. But, because close cases of interpretation of an administrative regulation must be resolved in favor of the administrator's interpretation, we disagree with *Stapleton*. . . . The

contend that the presumption may be invoked by a black lung claimant only if an invocation fact is established by a preponderance of the evidence. This conclusion is compelled jointly and independently by the language of the rule, by the Secretary of Labor's longstanding and consistent interpretation of it, which deserves judicial deference, and by the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1982) ("APA").

The Federal Respondent ("Director") agrees that a preponderance rule applies and that the holding below should be reversed. The Director's brief details the logical pattern of invocation and rebuttal intended by the agency, Brief for Federal Respondent at 22-27, but differs with Petitioners on a few key points. The Director argues that a preponderance standard is consistent with and supported—but not compelled—by the APA. The agency also argues that the generally applicable preponderance rule is modified by a "true doubt" rule which permits the claim adjudicator to construe evidence in equipoise in favor of claimants, *id.* at 33-35. Finally, the Director agrees that the Fourth Circuit's decision will be quite disruptive, but suggests that it will not ultimately affect the result in most of the pending claims. Petitioners vigorously disagree with this speculation.

Respondent Ray[2] urges affirmance, echoing the Fourth Circuit's opinion. Respondent Westmoreland Coal Company argues for application of a preponderance of the evidence standard and reversal of the Fourth Circuit's decision.[3]

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regulation entitles the claimant to a presumption of black-lung disease only if an X-ray 'establishes' the disease, and whether it establishes it or not may depend on what other X-rays show . . . ." *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1187 (7th Cir. 1987).

2. Respondent Cornett has filed no brief. Respondent Stapleton argues that the result in his case was not, in effect, supported by substantial evidence. This is outside the scope of the writ of certiorari and not properly before the Court. Supreme Court Rule 34.1(a). The decision in Stapleton's case is final and his arguments are moot.

3. Westmoreland's Brief at 14-15 appears to argue that application of a preponderance standard in the invocation analysis is compelled by *Steadman* v. *SEC*, 450 U.S. 91 (1981). Petitioners believe that *Steadman* is strongly supportive, but not controlling.

The National Coal Association filed a brief amicus curiae urging reversal on grounds of deference and non-compliance with APA protections. Importantly, this brief details the great difficulty encountered by mine operators in their efforts to rebut the presumption on the basis of obtainable evidence. Brief of the National Coal Association at 11-14.

The United Mine Workers of America ("UMWA") also filed a brief amicus curiae. Arguing for affirmance, it theorizes that the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1982) ("Act"), its early legislative history, and the plain language of the interim presumption support a single-item invocation rule. Brief of UMWA at 3-21.

I.
THE ACT AND ITS HISTORY NEITHER COMPEL NOR SUGGEST AN IRREBUTTABLE SINGLE-ITEM INVOCATION RULE

In the opening brief, Mullins argues that the language of Section 413(b) of the Act, 30 U.S.C. § 923(b) (1982), requiring the consideration of all relevant medical data "where relevant," strongly supports if not mandates the conclusion that a black lung factfinder must weigh conflicting evidence wherever in the analysis of the case the conflict is presented. An interim presumption claim is in no way excluded from the reach of this provision. The Director agrees. Brief for the Federal Respondent at 28. The UMWA argues that we read Section 413(b) too narrowly "as pointing to a specific chronological point in the evidentiary process." Brief of UMWA at 5 n.4. The plain language of the statute provides that relevant evidence is considered whenever it is relevant to the finding being made.

The briefs of the parties demonstrate that there is nothing in the Act which detracts in any way from application of a preponderance rule to an invocation analysis. One key provision, Section 413(b), directs the Secretary to require the weighing of

relevant conflicting evidence on invocation of the interim presumption, as elsewhere.[4]

Mullins also details the fact that *every* legislative reference post-dating the House/Senate Conference which produced the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978), (which, inter alia, authorized the Secretary of Labor to write an interim presumption) emphasizes that, when applied in Labor Department claims, all relevant evidence submitted in the case is to be given full consideration. At no place is this mandate withdrawn from an invocation inquiry or otherwise restricted. There is no statement in the vast legislative history of this Act which even suggests the single-item invocation rule settled upon by the court below.

The claimant, respondents and the UMWA seek to construct a historical record for a proposition that was not under consideration by Congress. The Labor Department was directed to write its rule by the 1978 amendments to the Act. Citing a variety of general legislative statements dating from 1969 to 1972, reflecting Congress's undisputed intent to aid disabled miners and their families, the UMWA concludes that it has proven congressional endorsement of a single-item invocation rule. Brief of UMWA at 11-16. At the time these statements were made, there was no interim presumption and no legislation proposing such a provision. A legislative record which is so remote in both time and purpose is hardly an authoritative source of Congress's meaning.

4. The Seventh Circuit has considered the significance of the portion of § 413(b) that prohibits the Social Security Administration from employing "panels of second guessers" to reinterpret x-rays in Social Security black lung claims. *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1185, 1186. Noting that this limitation on the right to cross-examine evidence does not apply in Part C (i.e., Department of Labor) claims, *see Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 36 (1976), and in light of the facts presented, the Seventh Circuit found the limitation inapplicable. Congress made it abundantly clear that the § 413(b) limitation on the right to cross-examine x-ray evidence was not to apply to mine owners. *See* Brief for Petitioners at 23 n.34.

It is apparent that there is no legislative source for a conclusion that Congress seriously considered, much less mandated, a single-item invocation rule.[5]

II.
RESPONDENTS IGNORE THE LANGUAGE OF THE RULE

Both Mullins and the Director point to the language in each invocation category that the evidence to be relied upon for invocation "establish" or "demonstrate" the requisite invocation fact, 20 C.F.R. § 727.203(a)(1)-(4) (1986). This usage reflects the Secretary's imposition of a preponderance of the evidence standard in the invocation inquiry. While not expressly stated, the Seventh Circuit finds similar meaning in these words. *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1187.

The argument stands largely unanswered. To the extent an answer is attempted, it rests on the illogical premise advanced in the plurality opinion of Judge Hall below (Pet. App. 22a, n.8), which suggests, without rationale, that the term "establish" means one thing on invocation and another on rebuttal. Brief of Ray at 10 n.2; Brief of UMWA at 4-5. The UMWA also theorizes that mine operators should not complain because they can prevent unreliable evidence from accomplishing invocation by challenging the number of years worked in mining or disputing the authenticity or quality of the single item on which the claimant seeks to rely.[6] Brief of UMWA at 8.

5. The Briefs of Respondent Ray and the UMWA add nothing new to the discussion of the Fourth Circuit's reliance on a law review article written by Mullins' counsel. There remains no basis on which to conclude that the article supports or proves the Fourth Circuit majority's thesis.

6. Among the bases for challenge suggested by the UMWA is to "dispute the qualifications of the medical source of a given piece of evidence." Other than by proof that the medical source is not, in fact, a medical source, we see no way to mount such a challenge. There is no basis in the Fourth Circuit's opinion on which to conclude that, for example, a local family doctor's reading of an x-ray is any less likely to mandate invocation than is the opinion of a Board-certified radiologist. The Fourth Circuit's holding is that "any" evidence

The duration of a miner's employment has no conceivable relevance to the reliability or probative value of the medical evidence relied upon.[7] Similarly, any dispute over the authenticity of the single item or its compliance with regulatory quality standards is pointless if the best evidence available to resolve these questions—the opinions of other, perhaps more expert, authorities or the results of better tests—is largely precluded from consideration. The viewing of single items of evidence, in isolation from the record, serves no useful purpose other than automatic invocation.

What respondents overlook is that the plain language of the presumption gives no automatic credence to any x-ray interpretation, test result or medical opinion. Within its terms, the presumption precludes reliance on a chest x-ray, autopsy or biopsy unless it proves pneumoconiosis (Section 727.203(a)(1)); or ventilatory studies unless they prove "chronic respiratory pulmonary disease" (Section 727.203(a)(2)); or blood gas tests unless they prove the existence of a blood gas transfer impairment (Section 727.203(a)(3)); or a medical opinion unless it proves, in fact, the presence of "a totally disabling respiratory or pulmonary impairment" and is both reasoned and documented (Section 727.203(a)(4)). Evidence proven false or inaccurate by any means simply cannot meet the standard. Whether any item of evidence meets an invocation standard depends upon what else is in the record. Invocation does not turn on whether the claimant is somehow able to obtain an abnormal x-ray or test or favorable report, but whether that x-ray, test, or report in fact evidences the requisite abnormality. *See, e.g., Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1185 ("it is not the reading, but the X-ray, which establishes the presumption"). The language of the rule, taken as a whole, neither states nor

invokes no matter what the qualifications of the producer. *See also Haynes* v. *Jewell Ridge Coal Corp.*, 790 F.2d 1113, 1114 (4th Cir. 1986).

7. Further, the Third and Fourth Circuits have excused claimants from proving the duration of their coal mine employment. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987); *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983).

implies an intent to make the presumption available on uncontested and possibly false medical data.

III.
THE SECRETARY'S PREPONDERANCE RULE IS WORTHY OF DEFERENCE

Mullins' opening brief argues that all traditional rules compel deference to the Secretary's preponderance rule. Respondent Ray counters that the Secretary's interpretation is merely a "litigation position" that was not published in the *Federal Register*. Brief of Ray at 11. The UMWA agrees that the absence of a published formal statement of agency policy weakens the Secretary's claim and cites circuit court decisions purportedly demonstrating a lack of consistency in agency application of the rule. Brief of UMWA at 21-23.

A "litigation position," to which no deference is accorded, is a position advocated by counsel as distinct from the agency. Its existence may be discerned from a change in position during the course of litigation or from an absence of proof that the agency addressed and answered the question prior to litigation. *See Securities Indus. Ass'n* v. *Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 143-44 (1984). *Cf. Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 634 (1983). It is perfectly clear that the preponderance of the evidence rule advocated here is a longstanding and consistently applied rule of the agency, not its lawyers. Brief for Federal Respondent at 36-37.

An agency's interpretation of a published rule need not, and probably should not, be separately published in the *Federal Register*. Ideally, the published rule should speak for itself with clarity.[8] The rule is clear enough here. But, if a rule is deemed ambiguous, deference may be accorded in light of the agency's position in prior litigation, *E.I. du Pont de Nemours & Co.* v.

8. Respondent Ray suggests that 5 U.S.C. § 552(a) (1982) requires publication of the interpretation as well as the rule. Brief of Ray at 11. The APA imposes no such requirement. Publication of the rule is sufficient.

Collins, 432 U.S. 46, 54-55 (1977); its actions in administering the rule, *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 660 (1976); even by its arguments in this Court (so long as the interpretation is not solely that of counsel), *Bellotti* v. *Baird*, 428 U.S. 132, 143 & n.10 (1976); and by the many other factors previously discussed in Petitioners' opening brief at 32-33. In this case, all of these factors indicate that deference should be accorded the agency's interpretation.

Finally, the UMWA's reference to reported cases which purportedly do "not support the claim that there has been a consistent fifteen-year interpretation of the interim presumption," Brief of UMWA at 22-23, proves only that the presumption has not been consistently interpreted by the courts. The cases cited conclusively demonstrate that the agency was engaged in weighing invocation evidence and crediting the best evidence. Were that not so, those cases would not have proceeded from the administrative process to the courts.

No sound reason to decline deference has been identified.

IV.
TODAY, THE FOURTH CIRCUIT'S RULE MANDATES LIABILITY WITHOUT REGARD TO THE EVIDENCE

The Fourth Circuit majority holds that relevant evidence which is excluded from consideration in the invocation inquiry, including "nonqualifying X-rays, test results, and opinions," shall be considered in rebuttal and may suffice to rebut the presumption subject only to the statutory prohibition against denial by a single negative chest x-ray (Pet. App. 4a). The Director concludes from this holding that, since true doubt is resolved in favor of the claimant, the ultimate outcome in individual cases will not change whether the Fourth Circuit's or the Director's rule is applied. Brief for Federal Respondent at 16-17.[9]

9. The Director urges reversal because the Fourth Circuit's decision is wrong and will pointlessly disrupt ongoing litigation in thousands of claims. Petitioners agree. The Benefits Review Board has remanded hundreds of cases for retrial as a result of the Fourth Circuit's decision, and the numerous Administrative Law Judges' decisions reported in Volumes 9 and 10 of the *Black Lung*

The Director not only misstates and overemphasizes the rarely applied "true doubt" principle,[10] but also erroneously predicts the significance of this case.

Since certiorari was granted, both the Third and Fourth Circuits have made rebuttal virtually impossible in light of obtainable evidence and have largely abandoned the premise that invocation evidence ever would or could be considered in rebuttal. In one case, the Fourth Circuit reversed an Administrative Law Judge's ("ALJ's") denial of benefits. *Sykes* v. *Director, Office of Workers' Compensation Programs*, 812 F.2d 890 (4th Cir.

Reporter demonstrate the compelling power of automatic invocation at the trial level. It should be noted that very few of the thousands of ALJ and BRB decisions issued annually are published.

10. The true or reasonable doubt principle was not addressed in the proceedings below and has no application in these cases. It has been applied by the Benefits Review Board and advocated by Government counsel in *one narrow context*: If, on invocation only, the evidence is in perfect equipoise (e.g., two equally credible x-ray reports), an irreconcilable conflict may be resolved for the claimant. *Provance* v. *United States Steel Corp.*, 1 Black Lung Rep. (MB) 1-483 (Ben. Rev. Bd. 1978). The Benefits Review Board has never permitted application of a "true" or "reasonable" doubt rule on rebuttal, nor as far as we are aware has the Director ever argued for such application. "In the context of rebuttal, however, the [reasonable doubt] rule has little application since it is employer's burden to establish rebuttal. If the employer has fulfilled that burden, rebuttal is not defeated by evidence supportive of entitlement. It is not employer's burden to establish rebuttal beyond *all* doubt." *Highlander* v. *Westmoreland Coal Co.*, 5 Black Lung Rep. (MB) 1-339, 1-343 (Ben. Rev. Bd. 1982) (emphasis in original). *See also Waugh* v. *Valley Camp Coal Co.*, 6 Black Lung Rep. (MB) 1-430, 1-434 (Ben. Rev. Bd. 1983).

The reasonable doubt rule originated in a congressional report in which a Senate Committee directed the Secretary of Labor to write *regulations* which, in light of medical or scientific uncertainties, resolved doubts for the claimant. The doubt-resolving principle has no proper role to play in individual adjudications. *See* S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977); *Peabody Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 778 F.2d 358, 362 (6th Cir. 1985). If applied, the rule more often than not serves as an excuse to avoid weighing the evidence. If applied on rebuttal of the presumption, as the Fourth Circuit does, *Armentrout* v. *Director, Office of Workers' Compensation Programs*, 10 Black Lung Rep. (MB) 2-88, 2-92 (4th Cir. 1987), the rule is pernicious in that it requires the employer to rebut "beyond a reasonable doubt." Such a standard has no place in civil litigation; it is not a standard employers can meet. An ALJ's decision based upon a resolution of doubt rather than a rational weighing of the evidence is also largely unreviewable on appeal.

1987). The denial was predicated upon a finding, supported by pulmonary function tests ("PFTs"), arterial blood gases ("ABGs"), and a medical opinion that claimant suffered no respiratory or pulmonary impairment and thus could not be deemed totally disabled by black lung disease. *Id.* at 892-93. PFTs and ABGs are used primarily to measure the severity of an individual's lung disease. Typically, the tests are not cause-specific and rarely can they either pinpoint or rule out black lung as a cause of the impairment measured. *See* Brief for Petitioners at 14-15. In reversing the denial of benefits, the Fourth Circuit held that those tests were irrelevant because proof of the absence of severe or totally disabling lung disease cannot rebut.[11] Rather, to accomplish this end, the employer must prove that the miner is not totally disabled "*for whatever reason*," whether or not that reason is black lung-related. 812 F.2d at 894 (emphasis in original). By this holding, the Fourth Circuit has relegated the objective pulmonary system tests to legal oblivion. Not only are unfavorable tests ignored on invocation, but they are incompetent rebuttal evidence as well.

In another case, the Fourth Circuit vacated a denial of benefits predicated upon an ALJ's conclusion that PFT and ABG tests showing no significant lung disease established rebuttal. *Adkins* v. *United States Dep't. of Labor*, 824 F.2d 287, 289-90 (4th Cir. 1987). The court held that what matters is whether the claimant is unable to work, not the reason for the disability. *Id.* at 290. *Accord Armentrout* v. *Director, Office of Workers' Compensation Programs*, 10 Black Lung Rep. at 2-92.[12]

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11. The Fourth Circuit's approach is very much like that of the Ninth Circuit which this Court rejected in *Bowen* v. *Yuckert*, 107 S. Ct. 2287 (1987). The Fourth Circuit has made the same generic error, as § 727.203(b) rebuttal tracks the SSA disability formula. It differs only in that the disability inquiry is limited to respiratory disease. The statutory connection is at 30 U.S.C. § 902(f)(1)(A), (C) (1982).

12. In at least one case decided prior to *Broyles*, the Fourth Circuit affirmed a finding of an absence of black lung disease based upon negative x-rays and medical opinions. *Long* v. *Itmann Coal Co.*, 10 Black Lung Rep. (MB) 2-145 (4th Cir. 1987).

More recently, the court held that the only way the interim presumption[13] can be rebutted is by proof that the miner "is either doing or capable of doing his usual coal mine work." *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d at 329. It does not matter whether the inability is due to lung disease or coal dust disease, or whether the miner even has coal dust disease. Thus, most, if not all, of the invocation evidence has become irrelevant to a rebuttal inquiry in the Fourth Circuit. As the Seventh Circuit has observed, the version of the interim presumption employed in *Broyles* "cannot be rebutted by medical evidence." *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1185; *see also Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 402 (7th Cir. 1987).

The Third Circuit follows approximately the same path. *Sulyma* v. *Director, Office of Workers' Compensation Programs*, No. 87-3024, slip op. at 6-7 (3d Cir. Sept. 1, 1987).

Thus, in the Third and Fourth Circuits, a claimant may obtain the benefit of the presumption by untested and possibly false evidence and, on rebuttal, proof of the unreliability or falsity has little or no value.

More significantly, many hundreds of cases recently decided by the Board and ALJs conclusively demonstrate that the single-item invocation rule dramatically impairs industry's ability to defend a non-meritorious claim. This Court's observation in *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976), that the distribution of proof burdens is "rarely without consequence and frequently may be dispositive" is no less true here than elsewhere.

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13. Here the Fourth Circuit applied the Social Security Administration's interim presumption to Department of Labor claims, *i.e.*, 20 C.F.R. § 410.490 (1986), noting that it is more liberal than 20 C.F.R. § 727.203 (1986) in certain respects and that its application is therefore required in principle by 30 U.S.C. § 902(f)(2) (1982). Requests for extensions of time to petition for certiorari have been granted by this Court to the Solicitor General and certain intervenors in related cases. *Pittston Coal Group* v. *Sebben* (No. A-219); *Brock* v. *Sebben* (No. A-220).

V.
THE APA APPLIES AND CONTROLS

The APA is the statute which guarantees certainty and fairness in the conduct of administrative litigation. It ensures the co-equal status of the parties with respect to evidence and procedure. 5 U.S.C. § 559 (1982). We seek these rights. It is more than apparent that they are not forthcoming in individual adjudications. After fifteen years, interim presumption invocation remains unsettled; in at least two circuits, invocation is virtually guaranteed, whether or not the evidence favoring it is reliable, probative or substantial. In the Seventh Circuit, weighing of evidence is only permitted, not required, *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1187, and the ALJ is simply free to weigh evidence if so inclined. The Sixth Circuit, recognizing the confusion, now finds it necessary to seek the advisory opinion of the Benefits Review Board. *Patton* v. *National Mines Corp.*, 825 F.2d at 1038. The Third and Fourth Circuits have resolved the problem largely by closing the door to employers on both invocation and rebuttal. The standard of proof and quantum of proof required for rebuttal remain an enigma. In the Fourth Circuit, the employer surely seems saddled with proving rebuttal beyond a reasonable doubt. *Armentrout* v. *Director, Office of Workers' Compensation Programs*, 10 Black Lung Rep. at 2-92; (the Act "should be liberally construed so that all doubts are resolved in favor of the disabled miner"). *See also* Pet. App. 23a (Opinion of Hall, J.) ("employer must *rule out* the causal relationship between the miner's total disability and his coal mine employment in order to rebut . . ." (emphasis in original)). The Sixth and Seventh Circuits are reluctant to address rebuttal proof standards. *York* v. *Benefits Review Board*, 819 F.2d 134, 138-39 (6th Cir. 1987) (petition for rehearing filed) (Celebrezze, J., concurring); *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1184. The standard in the Third Circuit is unclear. *See Pavesi* v. *Director, Office of Workers' Compensation Programs*, 758 F.2d 956, 965-66 n.15 (3d Cir. 1985). The Director's "doubt rule" is

hardly illuminating. Even if employers can assume that the burden of persuasion shifts after invocation, it remains extremely difficult to determine the quantum or even the nature of proof required to carry the rebuttal burden.

The APA is the logical key to restoring fairness and certainty in black lung litigation. "The [APA] is designed to afford parties affected by administrative powers a means of knowing what their rights are and how they may be protected." S. Rep. No. 752, 79th Cong., 1st Sess. 7 (1945), *reprinted in* Senate Comm. on the Judiciary, *Legislative History of the Administrative Procedure Act*, 79th Cong., 2d Sess. 185, 193 (1946) [hereinafter *APA Legislative History*]. Mullins does not contend that any provision of the APA restricts an agency's authority to allocate burdens or elements of proof consistent with its statutory mandate. We *do* contend that, once the agency designates which facts must be proven by which side, the party assigned the burden of proving the fact in question must, in an APA proceeding, do so by the weight of the reliable, probative and substantial evidence—that is, by a preponderance.

The legislative history of the APA and the decisions of this Court amply support this conclusion. Section 7(c), § 5 U.S.C. § 556(d) (1982), imposes a burden of going forward with a prima facie showing of any fact a party is required to prove. *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 403 & n.7 (1983); S. Rep. No. 752, *supra*, at 22, *APA Legislative History* at 208; *see also* United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 75 (1947) [hereinafter *Attorney General's Manual*]. For purposes of an APA proceeding, in which there is no jury, there is no authority for the proposition that a prima facie case on any proof element arises on a single piece of favorable evidence alone. The APA framers stated, "wherever the burden of proof is upon private parties . . ., their competent evidence . . . to that effect shall be presumed true unless discredited or contradicted by other competent evidence." H.R. 339, 79th Cong., 1st Sess. § 6(d),

reprinted in APA Legislative History, *supra* p.13, at 139, 143.[14] The burden of going forward to establish a prima facie case is not met by viewing one part of the record in isolation from the whole. Where one kind of evidence is relevant to a finding or conclusion, it must overcome other evidence of the same kind to achieve its purpose "and no *finding* or *conclusion* may be entered except upon evidence which is plainly of the requisite materiality and competence . . . ." S. Rep. No. 752, *supra* p.13, at 22, *APA Legislative History* at 208 (emphasis added). *See also id.* at 84-85, *APA Legislative History* at 270-71. "To the extent that cross-examination is necessary to bring out the truth, the party must have it." *Id.* at 85, *APA Legislative History* at 271.

If invocation of a presumption by proof of one set of facts requires an inquiry into a second, rebutting set of facts, it would seem obvious that a prima facie case for invocation must be sustained on consideration of the whole record. *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253-54 (1981). The conclusion is common sense, and the APA framers expected that common sense would be employed in construing the APA. S. Rep. No. 752, *supra* p. 13, at 22, *APA Legislative History* at 208. There is nothing in the APA which implies that any proof burden may be carried merely by the presentation of any evidence. Indeed, it would make no sense for the APA to so provide, since the traditional purpose of a minimal burden of production is merely to get the case to a jury and there is no jury in an APA proceeding. *See Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. at 255 nn.7, 8. But even in a jury trial, cross-examination of the plaintiff's witnesses is a right secured for the defendant. From their writings, it is clear that the APA's framers intended that a party seeking to invoke a presumption such as the interim presumption would be required to do so by a preponderance of the evidence.

The Director argues that he is not bound by the APA and, even if he were, the APA requirements are satisfied where the party

14. Although this language first appeared in the statutory formulation and was removed, its meaning surely remains relevant.

assigned the burden merely produces *any* evidence to carry it.[15] In asserting carte blanche exemption from the APA, the Director asks the Court to break new ground in interpreting 5 U.S.C. § 559 (1982). Relying on general regulatory authority in 30 U.S.C. § 932(a) (1982) authorizing the Secretary to conform incorporated Longshore Act provisions to black lung claims administration, it is suggested that this provision also authorizes the Secretary to pick and choose from among APA provisions those which he would like to use. This construction of Section 932(a) is at odds with the decisions of this Court interpreting 5 U.S.C. § 559, *see* Brief for Petitioners at 38 and cases cited therein; and it is at odds with the views of the circuits when they were presented with this same argument, *id.* at 39-40. It is at odds with the legislative history of the APA, *see* Senate Comm. on the Judiciary, 79th Cong., 1st Sess., *Administrative Procedure Act* ____ (Comm. Print 1945), *reprinted in APA Legislative History*, *supra* p. 13, at 11, 43 (stating that "implied amendments shall be precluded"); *see also* S. Rep. No. 752, *supra* p.13, at 30, *APA Legislative History* at 216; 92 Cong. Rec. 2148, 2159 (1946) (statement of Sen. McCarren); *Attorney General's Manual*, *supra* p.13, at 139 (courts should construe APA provisions as applicable, absent clear statutory provisions to the contrary). It is at odds with the actions of Congress which, in 1976, believed it necessary, notwithstanding Section 932(a), to enact a special, limited APA exemption, *see* Brief for Petitioners at 40 n.54; and it

15. The Director argues (Brief for Federal Respondent at 35) that § 7(c) according to *NLRB* v. *Transportation Management Corp.*, 462 U.S. at 403-04 n.7, merely requires the movant to bear a burden of production and that the preponderance rule, according to *Steadman* v. *SEC*, 450 U.S. 91, 95-104 (1981), applies only to the end result. Neither case clearly supports the Director's view and the Director's use of both begs the question. The *NLRB* footnote and the case cited therein acknowledge that § 7(c) determines the burden of going forward with a prima facie case. In *NLRB*, the General Counsel made such a case by a preponderance of the evidence and thereby shifted the ultimate burden of persuasion. *NLRB* speaks not at all to whether the Board might have further reduced the quantum of proof the General Counsel was required to present. *Steadman* involved no shift in burdens and speaks only to the quantum of proof required to support a finding generally.

is at odds with the expressed views of Congress in its 1977 review of Section 932(a).[16]

If there is any authority for construing Section 932(a) so broadly, it is not cited. But what is most troubling about the Director's argument is the proposition that the agency may extend or withdraw APA protections at will, either by rule or, as with the "true doubt" theory, by argument. The Director's request for a general APA exemption must be denied.

Finally, the UMWA attacks Petitioner's APA argument, citing *IT&T Corp.* v. *Local 134, IBEW*, 419 U.S. 428 (1975), for the proposition that invocation of the presumption is not part of a "final disposition" within the meaning of 5 U.S.C. § 551(6) (1982) and thus not an "adjudication" subject to the APA. Brief of UMWA at 27-29. In *IT&T*, the Court held that a non-binding advisory opinion entered under Section 10(k) of the National Labor Relations Act, 29 U.S.C. § 160(k) (1982), was not an APA-covered proceeding. 419 U.S. at 443-446. The UMWA claims that invocation of the interim presumption is analogous. It plainly is not. In fact, it fits *IT&T's* "prototype" for agency processes that are subject to the APA. Invocation follows "a hearing before an administrative law judge who makes findings of fact and conclusions of law, initially decides the case, and whose recommended decision 'becomes the decision of the agency . . . unless there is an appeal . . . .'" *Id.* at 445. If the presumption is invoked and not rebutted, the employer must pay benefits or appeal. There is nothing advisory about it. It is not in any way separate from the final determination. Invocation is an integral

16. S. Rep. No. 209, *supra* n. 10, at 18. "Subsection (e) [amendment to 30 U.S.C. § 932(a)] makes clear that any and all amendments to the Longshoremen's . . . Act (to the extent specified in Section 422(a)) shall be applied to claims proceedings under Part C. This includes the 1972 amendments relating to the use of Administrative Law Judges in claims adjudication." *Id.* Indeed, in 1978, a grandfather clause was enacted to permit non-ALJs who had been hearing claims to continue to do so for one year, to remedy the Secretary's inability to deviate from APA and Longshore Act requirements in this regard. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 7(h), 92 Stat. 95, 99-100 (1978). Congress obviously did not believe it had granted the Secretary the authority asserted.

part of the "agency process for the formulation of an order." 5 U.S.C. § 551(7) (1982).

When Congress directed that APA protections apply to the "whole or a part" of an agency final disposition or sanction[17] it surely did not mean some parts but not others. The legislative history so states. In discussing the reach of Section 7(c), its framers intended not only that the totality of final disposition be subject to the APA, but that each individual finding or conclusion of which that disposition is composed be reached in accordance with the APA. *See* H.R. 339, *supra* p.13, §§ 6(d), 8(d), *APA Legislative History* at 143, 145-46; S. Rep. No. 752, *supra* p.13, at 22, 84-85, *APA Legislative History* at 208, 270-71; 92 Cong. Rec. 2148, 2157-58 (1946) (statements of Sen. McCarren). On judicial review under 5 U.S.C. § 706(2) (1982), the focus on individual findings and conclusions is reiterated.

The question presented here is not whether the APA applies. It surely does. Nor is the question whether invocation of the presumption is somehow separable from the order or sanction disposing of the case. It surely is not. The question here is whether under the interim presumption a claimant may meet the burden of going forward with a prima facie case, *i.e.*, whether he may establish an invocation fact without having his evidence scrutinized for its reliability, probative value and substantiality. For the reasons stated, Mullins submits that it was the intent of the APA's authors that such critical evidence would be so scrutinized at the point of greatest relevancy—in the invocation analysis.

17. The UMWA disputes Petitioners' classification of an award of black lung benefits as a "sanction" (which does not expressly require a "final disposition") rather than an "order," which does so require. A grant of compensation is clearly defined as a sanction, but the classification makes little difference. What is critical in 5 U.S.C. §§ 551(6) and (10)(E) (1982) is that both apply the APA to the whole of the proceeding *and* its identifiable parts.

CONCLUSION

The decision of the Fourth Circuit mandating liability on irrebuttable evidence should be reversed.

Respectfully submitted,

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October 6, 1987

No. 86-327

In the Supreme Court of the United States

OCTOBER TERM, 1987

MULLINS COAL COMPANY, INC.
OF VIRGINIA, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAM, UNITED STATES DEPARTMENT
OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENT

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REPLY BRIEF FOR THE FEDERAL RESPONDENT

The federal respondent offers this reply brief to bring to the Court's attention several recent courts of appeals' decisions relevant to this case. We believe that the arguments presented in our main brief adequately address the arguments raised by the United Mine Workers and by respondents Stapleton and Ray and thus do not specifically reply to their briefs at this time.[1] We note, however, that some recent decisions, by restricting methods of rebuttal, have led us to alter the view expressed in our

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[1] We note that respondent Stapleton's entire argument appears to be an attack on the court of appeals' conclusion that the presumption of disability, although properly invoked by the administrative law judge (ALJ), had been rebutted in his case. Because certiorari has been sought solely on the issue of the type of evidence that invokes the presumption, and respondent Stapleton did not file a cross-petition, his attempt to attack the court of appeals' decision on this ground is precluded. See Sup. Ct. R. 21.1(a).

opening brief (at 16-17, 33-34) that the Fourth Circuit's ruling on invocation will not change the outcome in a significant number of federal black lung cases litigated under the interim Part C regulations.

1. In the past few months, several courts of appeals have clarified their positions regarding the invocation issue presented here. The Seventh Circuit in *Cook* v. *Director, OWCP,* 816 F.2d 1182 (1987), has squarely rejected the holding of the Fourth Circuit in this case and concluded that the interim presumption may be invoked only by a preponderance of the evidence in each category. The Sixth Circuit has reaffirmed its conclusion that x-ray evidence must be weighed before invocation under Subsection (a)(l), see *Back* v. *Director, OWCP,* 796 F.2d 169, 172 (1986), and extended that ruling by holding that ventilatory function and blood gas studies must be weighed under Subsections (a)(2) and (3). *Prater* v. *Hite Preparation Co.,* No. 86-3653 (6th Cir. Sept. 22, 1987). The same court, however, has also suggested that claimants' burden of proof to invoke under Subsection (a)(4) remains an open issue suitable for resolution by the Benefits Review Board. *Patton* v. *Director, OWCP,* No. 85-3781 (6th Cir. Aug. 3, 1987).[2] Finally, although the Third Circuit continues to adhere to the view of the en banc Fourth Circuit below, it has retracted its view that the Director's position on invocation was a recently formulated litigation position. See *Revak* v. *National Mines Corp.*, 808 F.2d 996, 1004 (3d Cir. 1987) (opinion sur denial of panel rehearing).[3]

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[2] Copies of *Patton* were submitted to the Court and parties earlier. On September 16, 1987, the court of appeals denied a petition for rehearing en banc on rebuttal issues in the case; a petition for rehearing addressed to the panel on the Subsection (a)(4) invocation issue is still pending. Copies of *Prater* are submitted with this reply brief.

[3] The Tenth Circuit, without any discussion of the other courts of appeals' decisions, recently held that it is not clearly erroneous to deny invocation where a positive x-ray is re-read as negative. Compare *Plutt* v. *Benefits Review Board,* 804 F.2d 597, 598 (10th Cir. 1987) (per curiam) with *Haynes* v. *Jewell Ridge Coal Corp.*, 790 F.2d 1113, 1114 (4th Cir. 1986).

2. We stated in our opening brief (at 16-17) that the court of appeals' conclusion in this case—that the presumption in 20 C.F.R. 727.203(a) may be invoked by one piece of qualifying medical evidence—should have little practical effect on the disposition of claims under the interim regulations. The basis for that assertion lies in the "true doubt" rule, which requires that the claimant prevail on those issues as to which the evidence is in equipoise. In view of that rule, the Director's requirement that the claimant prove the basic invocation facts by a preponderance of the evidence appears to have much the same effect as the Fourth Circuit's imposition of a preponderance burden for all issues on the rebutting party. In either scheme, close calls go to the claimant.

The results, however, will only be the same under the Fourth Circuit's rule if all relevant evidence (including evidence that was insufficient to invoke the presumption) is considered and weighed in the rebuttal stage. We understood the Fourth Circuit's position on invocation to be balanced by a requirement that all relevant evidence be considered on rebuttal.[4] If some items of relevant evidence are not considered or not given their proper weight on rebuttal, then the general congruity between the invocation stage and the rebuttal stage would be disrupted and the Fourth Circuit's rule on invocation would indeed make a difference to the outcome of a significant number of cases.

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[4] In its decision, the court of appeals limited consideration of the medical evidence on rebuttal only to the extent that a single negative x-ray cannot rebut the presumption, as 30 U.S.C. 923(b) provides. See Pet. App. 27a, 53a, 99a.

For example, suppose a miner has a single qualifying ventilatory function test and a number of nonqualifying tests which the ALJ determines are more reliable. Under the Director's view, the miner would be unable to invoke the presumption under Subsection (a)(2) because his "[v]entilatory studies [do not] establish the presence of a chronic respiratory or pulmonary disease." Under the Fourth Circuit's view, the single qualifying test would be sufficient to invoke the presumption of disability due to pneumoconiosis. On rebuttal, therefore, the mine owner (or Director) must be able to use the nonqualifying test results to rebut that presumption by showing that the miner—even if he is disabled by some other cause, such as a heart attack—does not in fact have a "chronic respiratory or pulmonary disease." The same general symmetry should apply to blood gas studies used to invoke the presumption under Subsection (a)(3) and to "other medical evidence" under Subsection (a)(4). Such symmetry will enable the mine owner to rebut (on the Fourth Circuit's view) what the miner would have been unable (on the Director's view) to establish in the first place.

Recent courts of appeals decisions, however, by disrupting this general symmetry, suggest that in fact the method of invocation will alter the outcome in a significant number of cases. These courts have, in one way or another, restricted the rebuttal use of evidence tending to establish the absence of a totally disabling pulmonary or respiratory impairment (*e.g.*, nonqualifying ventilatory studies or blood gas studies or medical reports), evidence which, under the Director's view, might have defeated invocation. For example, several courts have held that such evidence is irrelevant to rebuttal [redacted] under Subsection (b)(2), which focuses on a miner's ability to do his usual coal mine work or comparable and gainful work. See, *e.g.*, *Roberts* v. *Benefits Review Board*, 822 F.2d 636, 638 (6th Cir. 1987); *Sykes* v. *Director, OWCP*, 812 F.2d

890, 893-894 (4th Cir. 1987); *Wetherill* v. *Director, OWCP*, 812 F.2d 376, 380 (7th Cir. 1987) (dicta); *Kertesz* v. *Crescent Hills Coal Co.*, 788 F.2d 158, 162 n.5 (3d Cir. 1986) (dicta). These courts rejected the Director's contention that the miner's inability to work must stem, not from any physical cause, but from a pulmonary or respiratory impairment. The courts held that the cause of the miner's inability to work is irrelevant under Subsection (b)(2) and that the absence of a respiratory or pulmonary impairment is only relevant, if at all, under Subsection (b)(3), which requires the party contesting eligibility to "establish[] that the total disability or death of the miner did not arise in whole or in part out of coal mine employment," or Subsection (b)(4), where the contesting party must disprove the existence of pneumoconiosis.

These same courts, however, have also indicated that the rebuttal burden under Subsection (b)(3) is especially onerous. *Adkins* v. *United States Dep't of Labor, OWCP*, 824 F.2d 287, 290 (4th Cir. 1987); *Roberts* v. *Benefits Review Board*, 822 F.2d at 639; *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 123-124 (4th Cir. 1984). It is not at all clear from these cases that proof that a claimant suffers no totally disabling pulmonary or respiratory impairment is a viable method of Subsection (b)(3) rebuttal. Compare *Roberts* v. *Benefits Review Board*, 822 F.2d at 639, with *Wright* v. *Island Creek Coal Co.*, 824 F.2d 505, 508-509 (6th Cir. 1987). Nor does it appear that Subsection (b)(4) rebuttal, which requires proof of the absence of pneumoconiosis, is congruent with proof that a miner has no totally disabling pulmonary or respiratory impairment. See, *e.g.*, *Pavesi* v. *Director, OWCP*, 758 F.2d 956, 965 (3d Cir. 1985).[5]

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[5] It should be stressed that a miner can have simple pneumoconiosis, as evidenced by x-rays, without suffering from a disabling respiratory or pulmonary disease stemming from the pneumoconoisis. Conversely, a miner can have a disabling respiratory

If proof that a miner is not totally disabled by a pulmonary or respiratory disease is unavailable as a method of rebuttal, then the crucial premise of the court of appeals' ruling—that all relevant medical evidence not weighed on invocation would be weighed on rebuttal (Pet. App. 27a, 53a, 99a)—is called into question, as is compliance with the statutory requirement that all relevant medical evidence be considered in deciding claims (30 U.S.C. 923(b)). In our view, this apparent trend toward a restrictive reading of the rebuttal categories—unless otherwise reversed—provides a strong argument, in addition to those advanced in our opening brief, for accepting the Director's view that a claimant may invoke the presumption only by a preponderance of the medical evidence in a particular category.

The court of appeals' decision should be reversed and the case remanded for reconsideration of the administrative decisions under the proper legal standard.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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OCTOBER 1987

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or pulmonary disease without suffering from pneumoconiosis. The two questions are medically distinct and, thus, must remain distinct on rebuttal. Otherwise, a miner who has simple pneumoconiosis as shown by x-ray evidence, but does not have any disabling respiratory or pulmonary disease, and yet is unable to work for a completely different reason (such as a heart attack or a car accident) would be entitled to benefits as if he were disabled by the pneumoconiosis.

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Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON and WESTMORELAND COAL COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OF THE NATIONAL COAL ASSOCIATION AND

BRIEF OF NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The National Coal Association (NCA) respectfully moves, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of the Petition of Mullins Coal Company, Incorporated of Virginia, et al., in the above-captioned case. This motion has been made necessary by the refusal of Respondents, Glenn Cornett and Gerald R. Stapleton to consent to the filing of this brief. Written consent for NCA to file its brief *amicus curiae* has been provided by the Solicitor General and all Petitioners.

NCA's attached brief provides more detail concerning its interest in the disposition of this case as well as arguments in sup-

port of Petitioners. Accordingly, NCA respectfully moves for leave to file this brief amicus curiae.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The National Coal Association ("NCA") is a trade association comprising approximately 125 members. Its coal-producing members account for over fifty percent of the nation's commercial coal production and operate in every coal-producing sector of the United States. In addition to coal mining companies, the NCA's membership includes coal brokers, equipment suppliers, coal transporters, consultants, and resource developers.

NCA producer members, and all other U.S. coal producers, are responsible for the payment of benefits to eligible claimants

under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, in two direct ways: (1) as individual coal mine operator defendants in certain black lung cases, 30 U.S.C. § 932-933; and (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund ("BLDTF"), 26 U.S.C. § 4121. The BLDTF is administered by the Secretaries of Labor, Treasury, and Health and Human Services, 26 U.S.C. § 9501(a)(2). The BLDTF is used to pay black lung compensation awards to eligible claimants whose coal mine employment ended before January 1, 1970; or, in cases in which a responsible coal operator defendant cannot be identified, 26 U.S.C. § 9501(d).

The tax paid by coal producers into the BLDTF is currently set at $1.10 per ton on underground-mined coal and $.55 per ton on surface-extracted coal, 26 U.S.C. §§ 4121(a), (b). The BLDTF has collected over $3.403 billion in tonnage taxes from coal producers since 1978;[1] in fiscal year 1986 the nation's coal producers paid $630,407,573 into the BLDTF.[2]

Despite these substantial tax revenues, there has been a continuing shortfall between black lung payment obligations of the BLDTF and the income from the producers' tax. Indeed, the BLDTF has paid out over $4.93 billion in compensation since 1978,[3] and in fiscal year 1986, disbursed $629 million.[4] The massive growth in BLDTF liability is to a substantial degree attributable to the approval of approximately 120,000 claims by

[1]Staff of Joint Committee on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* 3 (Comm. Print 1985); and information supplied by James DeMarce, Associate Director for the Division of Coal Mine Workers Compensation, U.S. Department of Labor, in a telephone interview with Bruce Watzman, NCA (Sept. 26, 1986).

[2]U.S. Dept. of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 31, 1986) (available through the U.S. Treasury Department).

[3]*See, supra* note 1.

[4]*See, supra* note 2.

the Department of Labor (and to a lesser extent, the Social Security Administration) under the requirements of the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, 92 Stat. 95, including the 20 C.F.R. § 727.203 interim presumption.[5] The approval rate greatly exceeded all Congressional projections about the impact of the 1978 amendments.[6]

To try to meet the shortfall between compensation levels and BLDTF revenue, the producers' tax has been increased twice from the 1978 rate of $.50 per ton on underground coal and $.25 per ton on surface-mined coal.[7] In 1981, the tax was increased 100% to $1.00 per ton (underground) and $.50 per ton (surface).[8] In 1985, the Administration proposed to again raise the tax, this time by 50%. Congress, however, acknowledging that the coal industry *was in financial difficulty and should not be*

[5]Office of Workers Compensation Programs, U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987) (draft) (available through the U.S. Department of Labor) [hereinafter 1987 Black Lung Claims Status Report]. From 1978 to the present, approximately 96,000 BLDTF claims have been approved by the Department of Labor pursuant to the 20 C.F.R. § 727.203. The BLDTF is also responsible for compensation in approximately 24,000 previously-denied claims approved by the Social Security Administration under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 [hereinafter the 1978 Amendments] and referred to the Secretary of Labor for payment from the Fund, 30 U.S.C. § 945(a)(2)(A); thus, the total number of claims that are the liability of the BLDTF because of the 1978 Amendments totals approximately 120,000. 1987 Black Lung Claims Status Report, *supra*.

[6]H.R. Rep. No. 151, 95th Cong., 1st Sess. 26, *reprinted in* 1978 U.S. Code Cong. & Ad. News 262. Prior to the 1978 amendments and the promulgation of 20 C.F.R. § 727.203(a), fewer than 5,000 claims had been approved under Part C. *See* Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W.Va. L. Rev. 677, 691 (1983), citing Staff of Subcomm. on Oversight, House Comm. on Ways and Means, *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund*, 97th Cong. 1st Sess. 23 (Comm. Print 1981) [hereinafter 1981 Oversight Subcommittee Background Report.).

[7]Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 2(a), § 92 Stat. 11 (1978).

[8]Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635.

saddled with added black lung taxes, enacted only a 10% tax increase to reach the current levels of $1.10 per ton (underground) and $.55 per ton (surface).[9]

In addition to the two tax increases, the BLDTF has been augmented by appropriations from the general treasury each year since its inception in 1978. These advances must be repaid by the BLDTF to the general treasury, with interest. 26 U.S.C. § 9501(c), (d)(4).[10] The present cumulative debt of the BLDTF in unpaid advances and interest is $2.88 billion, of which $1.032 billion is interest on advances as accumulated.[11]

Under a 1981 amendment to the Internal Revenue Code,[12] the producers' tonnage tax is to revert to the lower 1978 rate by January 1, 1996, or when there is neither a balance of repayable advances nor interest owed by the BLDTF, whichever date is earlier. With the current $2.88 billion debt of the BLDTF, the ability of the BLDTF to achieve solvency by 1996 is dubious, even under pre-*Stapleton* conditions. When the Administration attempted to increase the tax by fifty percent in 1985, the Department of Labor predicted that the advance and interest necessary to meet BLDTF obligations would exceed $30 billion by the year 2010. H.R. Rep. No. 241, 99th Cong., 2d Sess., 75-76, *reprinted in* 1986 U.S. Code Cong. & Ad. News 653-54. The President, moreover, proposed in his Fiscal Year 1988 Federal Budget that the tax be increased to raise $400 million in additional revenues.[13] This revenue proposal would mean an increase of the tax to approximately $1.75 per ton on underground coal and $.88 per ton on surface-mined coal.

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[9]*See* remarks of Senators Heinz and Warner, 131 Cong. Rec. S15,477-79 (daily ed. Nov. 14, 1985). Consolidated Omnibus Budget Reconcilation Act of 1985, Pub. L. No. 99-272, § 13203(a), 100 Stat. 312 (1986) [hereinafter 1986 BLDTF Amendment].

[10]The 1986 BLDTF Amendment placed a five-year moratorium on interest accruals with respect to advances to the BLDTF, 1986 BLDTF Amendment, Pub. L. No. 99-272, § 13203(b), 100 Stat. 312 (Apr. 7, 1986).

[11]*See, supra* note 1.

[12]Black Lung Benefits Revenue Act of 1981, *supra* note 8.

[13]Budget of the U.S. Government, Fiscal Year 1988, at 2-41.

The Fourth Circuit's decision in *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424 (1986) ("*Stapleton*") makes invocation of the interim presumption under 20 C.F.R. § 727.203(a) almost a certainty for every claimant. Invocation is tantamount to an award in the claims to be paid by the BLDTF, and measurably increases the likelihood of an award in claims that may become the liability of an individual mine owner. *Stapleton* therefore will greatly expand the liability of both individual coal mine operators and the BLDTF. As a result, increased revenues will be needed at a time when the BLDTF already is in a precarious financial state. *Stapleton* is clearly of tremendous importance to the coal industry and NCA.

SUMMARY OF ARGUMENT

Amicus NCA endorses fully the contentions of Petitioner Mullins Coal Company, Inc., et al., and presents additional arguments on selected points to assist the Court.

1. It has been the longstanding agency practice of the Department of Labor and the Social Security Administration to require black lung claimants to establish facts by a preponderance of evidence before invoking a black lung presumption. Hundreds of thousands of black lung claims have been adjudicated in this manner.

Coal operator defendants have reasonably based their defense efforts on the agency practice of weighing evidence prior to invocation, and have concentrated on challenging claimants' factual evidence prior to invocation. The radical change in the law by the *Stapleton* single-item invocation rule jeopardizes thousands of cases that had been decided under this consistent agency practice or which remain pending before the Benefits Review Board or the U.S. Courts of Appeal.

The historic Department of Labor interpretation is a permissible construction of a technical regulation and is eminently

worthy of judicial deference. *Stapleton* departs from the uniform application of the preponderance rule.

2. Single-item invocation is neither ameliorated nor cured by the 20 C.F.R. § 727.203(b) rebuttal inquiry. The Fourth Circuit relied heavily on the perceived capacity of the rebuttal process to undo any excesses of single-item invocation and ensure that all relevant medical evidence is considered in the ultimate eligibility determination. Decisions of circuits interpreting rebuttal provisions and practical experience in rebuttal belie this theory. Rebuttal is extremely difficult.

The significant easing of presumption invocation requirements by *Stapleton* and the inherent difficulty of rebuttal are particularly acute with respect to the BLDTF and its administration by the Department of Labor. The Department has neither the regulatory resource authority, nor the mission to build a rebuttal case.

Invocation is tantamount to entitlement in BLDTF cases and neither the coal operator nor any other party may challenge a BLDTF claims allowance.

3. The Administrative Procedure Act ("APA") is specifically incorporated into the Black Lung Benefits Act. Title 5 U.S.C. § 556(d), provides that the "proponent"of any agency rule has the "burden of proof," which must "be . . . supported by and in accordance with the reliable, probative, and substantial evidence and that a party is entitled to cross-examination as may be required "for a full and true disclosure of the facts." These rights are essential to ensure that black lung adjudication is conducted *fairly*, without granting one party a superior position over another.

The Fourth Circuit's decision dismisses the imperative role of the APA in black lung evidentiary matters and is an impermissible supersedure of 5 U.S.C. § 559.

ARGUMENT

I. DEFERENCE MUST BE ACCORDED TO THE LONG-STANDING AND REASONABLE AGENCY INTERPRETATION REQUIRING WEIGHING OF CONFLICTING EVIDENCE PRIOR TO INVOCATION OF THE INTERIM PRESUMPTION

A. The Department of Labor's Application of Pre-Invocation Weighing has Controlled the Adjudication of Black Lung Claims For Many Years.

Rebuttable evidentiary presumptions have been employed in the adjudication of black lung claims under both Part B of the black lung program, administered by the Social Security Administration ("SSA"), and under Part C, administered by the Department of Labor ("DOL"). These presumptions have both statutory and regulatory bases. 30 U.S.C. §§ 921(c)(1), (2), (4), (5); 20 C.F.R. § 410.490 (1986) (Pet. App. 163a); 20 C.F.R. § 410 Subpart D (1986); 20 C.F.R. 727.203(a) (1986) (Pet. App. 156a-158a); and 20 C.F.R. Part 718 (1986).

SSA has consistently weighed all relevant evidence prior to invocation, be it conflicting X-rays or pulmonary function studies. The presumption has been conferred by SSA only where the best and most reliable evidence justifies invocation. This approach has caused no great hardship to claimants. About 400,000 claims out of 534,000 claims filed with SSA have been awarded under this standard.[14] Hundreds of reported cases and

[14] 1981 Oversight Subcommittee Background Report, *supra* note 6 at 15, The Comptroller General of the United States, *Report to the Congress: Legislation Allows Black Lung Benefits Without Adequate Evidence of Disability* (1980) citing U.S. Department of Health and Human Services (Social Security Administration) figures. Black lung claim statistics must be viewed in the context of what are effectively two black lung programs. The Social Security Administration ("Part B") portion of the program generally covered claims filed before July 1, 1973 and paid benefits from general revenues (Part A of the statute is a general definitional section). The DOL portion of the program ("Part C") mandates payment of benefits by the BLDTF or coal operator defendants. In many instances, claimants denied under the SSA, Part B program refiled under the DOL, Part C portion and thus produced statistics under both parts of the statutory scheme.

thousands that are unreported illustrate that the recurring focus of Part B appeals has been whether the presumption was properly invoked in the face of conflicting evidence. A sampling of the many cases is provided in the briefs of Petitioners and the Government. The Fourth Circuit itself has also emphasized the propriety of such pre-invocation weighing:

> . . . we know of nothing in the Act, or in the 1972 amendments, or in their legislative history, to indicate that this fact [X-ray invocation] is not required to be proved by a preponderance of evidence, as is every other fact which is not presumed.

Sharpless v. Califano, 585 F.2d 664, 667 (4th Cir. 1978).

In 1978, Congress directed the Secretary of Labor to promulgate his own version of the interim presumption for application in review of pending and previously denied Labor Department cases. 30 U.S.C. § 902(f)(2). The legislature presumably was aware of the case law ratifying pre-invocation weighing. *See Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection,* 106 S. Ct. 755, 769-60 (1986). The 1978 black lung presumption, 20 C..F.R. § 727.203, was based on Congress' understanding that claimants had the burden of proof to establish the prerequisite invocation facts by a preponderance of evidence.

Since 1978, when 20 C.F.R. § 727.203(a) was promulgated, the Secretary has specifically maintained that all like-kind evidence should be weighed prior to invocation of the presumption. *See, e.g.,* Brief for Director, Office of Workers' Compensation Programs, U.S. Department of Labor, *Consolidation Coal Co. v. Sanati,* 713 F.2d 480, (4th Cir. 1983). In *Sanati,* which was overruled by *Stapleton,* the Department of Labor and the employer both argued successfully that the correct burden of proof on invocation was a preponderance of the evidence standard, thus requiring weighing. Other Part C case

law reflects the consistent agency practice of weighing conflicting like-kind medical evidence prior to invocation. *See, e.g., Consolidation Coal Co. v. Chubb,* 741 F.2d 968, 972 (7th Cir. 1984) and *Markus v. Old Ben Coal Co.,* 712 F.2d 322 (7th Cir. 1983).

Well over 275,000 black lung claims[15] adjudicated under the Department of Labor program were subject to the interim invocation presumption at issue here. In all of those claims, invocation evidence was analyzed by the Department of Labor under a preponderance of the evidence standard. The mine operator defendants in these cases have relied upon invocation being based on a preponderance of the reliable, relevant evidence. Defendants have expended vast resources in reliance on this consistent interpetation of the invocation standard by the Department of Labor and on the expectation that this powerful presumption would continue to be so interpreted. *Stapleton* reflects the first departure from the uniform application of the preponderance of the evidence standard to facts invoking the presumption. To adopt the *Stapleton* single-item invocation holding now would assuredly necessitate the retrial of thousands of claims, cause a substantial disruption in the orderly administration of the program, and, without doubt, add billions of dollars in unanticipated and unfunded black lung program costs.

An administering agency's interpretation of its own regulation is given controlling weight if it is reasonable and not directly contrary to statute. *United States v. Larionoff,* 431 U.S. 862, 872 (1977); *Securities and Exchange Commission v. Sloan,* 436 U.S. 103, 118 (1978). Where, as here, the interpretation has been consistent and longstanding, the case for deference is even stronger. *United States v. National Ass'n of Sec. Dealers,* 422 U.S. 694, 719 (1975).

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[15] 1987 Black Lung Claims Status Report, *supra* note. 5.

The Department of Labor's balancing of all relevant pre-invocation facts is certainly a reasonable interpretation[16] of 20 C.F.R. § 727.203(a). Its consistent application by the DOL to hundreds of thousands of claims – resulting in an approval of tens of thousands of them – belies any argument that this interpretation is contrary to the remedial purposes of the Act.

Rather than confront these arguments and the abundant case law on weighing prior to the ALJ invocation of black lung presumptions, the *Stapleton* court relied heavily, 785 F.2d at 451, 452, 453, 460, on a law review article[16] reporting that in draft form, 20 C.F.R. § 727.203 was reviewed in 1978 by non-elected staff members of certain key Congressmen and private black lung claimants' associations, who allegedly importuned the Department of Labor against pre-invocation weighing. The Fourth Circuit elevated this unelected staff and claimant effort – in which the coal industry had neither notice or a role – into agency intent and congressional approbation.

There is simply no authority for treating such anecdotal materials as legislative intent or agency explanation of a technical rule. Moreover, the reliance on Congressional staff personnel opinion amounts to crediting an informal legislative veto over the Department of Labor rulemaking. Such thinking appears to clash with the separation of powers principles re-articulated in *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983), which struck down a formal legislative veto. *See also Bowsher v. Synar,* 106 S. Ct. 3181, 3189 (1986).[17]

[16]Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues,* 83 W.Va. L. Rev. 869 (1981).

[17]The Fourth Circuit's refusal to defer to the agency's practice of weighing cannot be defended by reference to the allusions to the Congressional staff meetings with claimants' groups for two other reasons. First and foremost, the Department of Labor disavows the law review article's description of events and maintains that the consistent agency position has been pre-invocation weighing. Second, another portion of the article in question notes that with respect to 20 C.F.R. § 727.203:

> . . . it has been established that a claimant . . . bears the burden of proving the facts necessary to invoke the presumption by a preponderance of the credible evidence.

Solomons, *supra* note 16, at 903.

In sum, the consistent Department of Labor interpretation and application of 20 C.F.R. § 727.203(a) is a reasonable and fair approach that is entitled to substantial judicial deference. The rule should not be different for the many thousands of claims[18] which remain to be decided.

B. Rebuttal is Effectively Unavailable as a Cure for the Error of Single-Item-Invocation.

The Fourth Circuit in *Stapleton*, 785 F.2d at 434, speculates that any error arising from invocation of the § 727.203(a) presumption on the basis of a single item of qualifying evidence can be corrected[19] in the 20 C.F.R. § 727.203(b) rebuttal inquiry. Practical concerns as well as the decisions of the circuits interpreting rebuttal provisions nullify this position.

The rebuttal process is from the outset a "heavy burden" for employers. *Kaiser Steel Corp. v. Director, OWCP,* 748 F.2d 1426, 1431 (10th Cir. 1984). The rebuttal provisions are framed in terms of ultimate conclusions that intermix medicine and law.

[18]See Brief for Federal Respondent at 14, *Mullins Coal Company v. Director, OWCP,* No. 86-327 (Dec. 1986), stating that at least 10,000 pending cases involve the 20 C.F.R. § 727.203(a) presumption. Each black lung claim costs between $118,315 for an unmarried miner and $185,656 for a miner with an eligible spouse. U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefit Act* 32 (1981).

[19]The Third Circuit has followed *Stapleton* in *Revak v. National Mines Corp.,* 808 F.2d 997 (3d Cir. 1986). That court was also direct in its resort to the 20 C.F.R. § 727.203(b) rebuttal inquiry as a "cure-all" to any excesses of single-item invocation:

> The appellees argue that invocation of the interim presumption on the basis of one item of evidence gives disproportionate effect to that item of evidence offered by the claimant. This argument is unconvincing, for the rebuttal phase rights any alleged imbalance.

808 F.2d at 1001 n. 7.

Rebuttal facts are not necessarily medical facts and are foreign to medical witnesses. Traditional and sound medical evidence plays an important but rarely conclusive role in 20 C.F.R. § 727.203(b) rebuttal.

Rebuttal pursuant to 20 C.F.R. § 727.203(b)(4) (miner does not have pneumoconiosis) may be precluded absent proof positive that some form of "legal" pneumoconiosis (20 C.F.R. § 727.202) unknown to medical science is not present. *Pavesi v. Director, OWCP,* 758 F.2d 956, 965 (3d Cir. 1985). Numerous negative X-rays may still be insufficient to prove the absence of legal pneumoconiosis, and expert medical witnesses cannot generate evidence to prove the absence of a "legal" disease. Moreover, rebuttal on proof of the absence of pneumoconiosis 20 C.F.R. § 727.203(b)(4)) may be blocked if there has been invocation via X-ray proof of pneumoconiosis 20 C.F.R. § 727.203(a)(1). Negative X-ray evidence on rebuttal also inevitably collides with the 30 U.S.C. § 923(b) prohibition on denying a claim ". . . solely on the basis of the results of a chest roentgenogram."

Rebuttal, furthermore, is an extremely arduous task if the miner is disabled by a non-occupational condition such as cigarette-induced lung disease or congenital cardiovascular disease. At least three circuits have suggested that 20 C.F.R. § 727.203(b)(2) rebuttal is substantially curtailed if the miner is impaired from working by any medical condition. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162 (3d Cir. 1986); *Sykes v. Director, OWCP,* ___ F.2d ___, No. 85-1441, slip op. at 9 (4th Cir. Mar. 3, 1987); and *Wetherill v. Director, OWCP,* ___ F.2d ___, No. 86-1053, slip op. at 6 (7th Cir. Feb. 25, 1987).[20]

[20]Prior to *Stapleton,* the Fourth Circuit held that objective evidence that is outside the classifications for total disability in the regulation ("non-qualifying evidence") is usually not sufficient for rebuttal under 20 C.F.R. § 727.203(b)(2). *Wilson v. Benefits Review Board,* 748 F.2d 198, 201 (4th Cir. 1984). With respect to rebuttal pursuant to 20 C.F.R. § 727.203(b)(3), the Fourth Circuit has held that a defendant employer must *rule out* the causal relationship between the miner's total disability and his coal mine employment to rebut the interim presumption. *Bethlehem Mines Corp. v. Massey,* 736 F.2d 120, 123 (4th Cir. 1984).

The combination of *Stapleton*'s easy, single-item invocation with a rebuttal process that clearly eschews objective medical evidence will place a grossly unfair burden on responsible operators. Moreover, coal company defendants have understandably centered their defense efforts on challenging invocation rather than retreating to strategies for rebuttal, which may be illusory as a practical matter. Literally thousands of case records have been assembled and are before the Benefits Review Board and the Court of Appeals challenging invocation; these are rendered virtually obsolete by the single-item invocation theory of *Stapleton.* It is simple enough to say that the consideration of all relevant medical evidence in the rebuttal inquiry preserves fair play. But when that very evidence is consigned to virtual irrelevancy by one legal device after another, the promise of fairness in the proceeding becomes, as Judge Phillips recognized, in *Stapleton,* an empty one. 785 F.2d 446-47 (Phillips, J., concurring in part, dissenting in part).

The situation on rebuttal is even more egregious for the far greater number of cases in which the BLDTF alone is the defendant. The Secretary of Labor's claim-processing regulations in 20 C.F.R. § 725.404-407 demonstrate that the Secretary has neither the mission, nor the resources, to obtain doctors' depositions and otherwise build a rebuttal case. Simply put, invocation equals entitlement in a BLDTF case, a point well known in the black lung community and confirmed in a 1982 General Accounting Office study of hundreds of Department of Labor interim presumption claims:

> In addition, numerous Labor field officials told us that, because rebuttal evidence was not specifically

defined, they ignored medical evidence that could have been used to rebut the claim.

The Comptroller General of the United States, *Report to the Congress: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* 13 (1982).

A Department of Labor claims examiner's approval of BLDTF case is also the last word, because neither the coal operator nor any other party may contest a BLDTF claim allowance. 30 U.S.C. § 934 (b)(1)(B).

The Fourth Circuit's reliance on rebuttal to ameliorate single-item invocation is simply wrong.

II. THE ADMINISTRATIVE PROCEDURE ACT REQUIRES WEIGHING OF EVIDENCE BEFORE INVOCATION OF THE INTERIM PRESUMPTION.

The Administrative Procedure Act, 5 U.S.C. §§ 554-559, provides a broad range of procedural rights to claimants and claim defendants. It is beyond dispute that the Administrative Procedure Act applies to black lung benefit hearings. The Black Lung Benefits Act specifically provides for its application. 30 U.S.C. § 932(a), incorporating 33 U.S.C. § 919(d). In accordance with 5 U.S.C. § 556(d), in a black lung benefits hearing, the proponent of a rule or order has the burden of proof, and no rule, order or sanction may issue without "consideration of the whole record" or those parts of the record supported by "reliable, probative, and substantial evidence." Moreover, 5 U.S.C. § 556(d) provides that "[a] party is entitled to present his case or defense . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Thus, the APA grants *both* parties rights, in order to preserve fundamental fairness and avoid a situation in which one party is in a more favorable position than another with respect to the consideration of evidence.

The coal industry has relied on the procedural safeguards of the APA to prevent benefit awards based on evidence that is proven unreliable. The coal industry is entitled to this reliance because the very clear language of the APA permits it. *Stapleton* is the antithesis of the full and fair disclosure of the truth mandated by the APA.

The *Stapleton* court's interpretation impermissibly supersedes the APA's evidentiary requirements. *Rusk v. Cort,* 369 U.S. 367, 379 (1962); *see also* 5 U.S.C. § 559.

The implications of this supersedure are profound. *Stapleton* takes away the employers' right to challenge claimant's evidence at the critical point in a black lung hearing by rejecting the preponderance of the evidence standard of 5 U.S.C. § 556(d) of the APA at the invocation stage. According to *Stapleton,* like-kind evidence should *not* be weighed before permitting claimant to satisfy his burden of proof of invocation. Instead, claimant is entitled to the presumption on evidence which may or may not be reliable or accurate – evidence which can be procured by any claimant with a minimum of effort.[21] The rule in *Stapleton* does not permit the opponent of invocation (the employer) to conduct cross-examination or to oppose unreliable or suspect evidence by the submission of more expert testimony, studies or X-ray readings. The rule in *Stapleton* also disregards the overriding goal of the APA for "full and true disclosure of the facts" by allowing a powerful presumption to control the outcome of a claim based on misleading or incomplete facts.

Stapleton additionally nullifies the Department of Labor's regulations that implement the APA's procedural safeguards and preserve fundamental fairness. *E.g.,* 20 C.F.R. §§ 725.452

[21] *See* J. Nelson, *Black Lung: A Study of Disability Compensation Policy Formation* 107 (School of Social Service Administration, Committee on Public Policy Studies, University of Chicago and Center for the Study of Social Policy, Washington, D.C., 1985)

and 725.455(b) (applying the APA to black lung hearings and the presentation of evidence at such hearings); 20 C.F.R. § 725.458 (governing depositions of witnesses).

If the APA cannot be construed to guarantee the orderly and fair consideration of a case, even a black lung case, its application is illusory and its undeniable purpose to eliminate unfairness in administrative proceedings is defeated. The erosion of the APA deprives claim defendants of meaningful review of their evidence and defeats the coal operators' reasonable reliance on APA protections in defending black lung claims. For these reasons alone, the interim presumption under 20 C.F.R. § 727.203 should be restored to its intended function, allowing facts to be presumed only on the basis of reliable, probative and substantial evidence. The APA should be accorded the significance it deserves in the context of black lung evidentiary inquiries.

CONCLUSION

The members of NCA urge the Court to:

(1) reverse that portion of *Stapleton* holding that invocation of 20 C.F.R. § 727.203(a) is satisfied by a single-item of qualifying medical evidence; and

(2) hold that claimants seeking to invoke 20 C.F.R. § 727.203(a) must establish requisite facts and discharge a burden of proof by a preponderance of evidence that requires weighing of conflicting like-kind evidence prior to invocation.

Respectfully submitted,

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No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA,
OLD REPUBLIC INSURANCE COMPANY and
JEWELL RIDGE COAL CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON
and WESTMORELAND COAL COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE UNITED MINE WORKERS OF AMERICA IN SUPPORT OF CLAIMANT RESPONDENTS

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STATEMENT OF INTEREST

The United Mine Workers of America represents over 200,000 working, retired and laid-off coal miners throughout the United States and Canada. The UMWA was a primary force in the adoption of the Federal Coal Mine Health and Safety Act, which included the black lung benefits program at issue in this case. The UMWA is filing this amicus brief because of the profound effect the outcome will have on both its own membership and coal

miners in general. The ruling here will directly affect 10,000 black lung claimants and as a practical matter will determine whether many of them will receive benefits. Very frequently black lung benefits make the difference between a recipient living at a bare subsistence level or with some minimal degree of comfort and security.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents the second major attempt by coal operators to undermine the clear congressional intent that black lung benefits be liberally awarded based upon a readily invocable presumption. The first such challenge took place in the matter of *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In that case this Court turned back the operator's broadside constitutional attack which argued that the Black Lung Act's definitions, presumptions and limitations on rebuttal evidence unconstitutionally impaired their ability to defend against benefit claims.

Here, coal mine operators seek a restrictive interpretation of 20 C.F.R. § 727.203 and attack the decision of the Fourth Circuit below. As in *Usery*, the operators' arguments should be rejected. As shown below, the express language and structure of the regulation as well as the lengthy legislative history surrounding the Black Lung Act, as amended, compel the conclusion that the interim presumption may be invoked upon the showing of ten years of coal mine employment and the production of a single item of qualifying evidence. In addition, the Petitioners' claim that the Secretary's position is entitled to deference by this Court is not supported and the Administrative Procedure Act does not mandate the interpretation sought by Petitioners.

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[1] The total household income from all sources for miner recipients is only $11,740 and for widow recipients is $8,170. U.S. Department of Labor Employment Standards Administration, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 17 (1983).

ARGUMENT

I. THE EXPRESS LANGUAGE AND THE STRUCTURE OF SECTION 727.203 SUPPORT THE INTERPRETATION THAT THE PRESUMPTION IS INVOKED UPON A SHOWING OF TEN YEARS OF COAL MINE EMPLOYMENT AND THE PRODUCTION OF ONE ITEM OF QUALIFYING EVIDENCE

For support of the Fourth Circuit's interpretation of the interim presumption, one need go no further than the language and structure of Section 727.203 itself. Under subsection (a) of the regulation, a miner must prove that he has engaged in coal mine employment for ten years and then may invoke the presumption if he meets one of four distinct medical requirements. Subparagraphs (1) and (4) of subsection (a), by their own terms, provide that a single qualifying x-ray or a single physician's opinion that a claimant has a disabling pulmonary impairment will suffice to trigger the presumption. Sub-paragraph (a)(1) refers to "*a* chest [x-ray]" and (a)(4) refers to the documented opinion of "*a* physician exercising reasoned medical judgment" (emphasis supplied).

Under sub-paragraphs (a)(2) and (3), the regulation uses the term "ventilatory studies" and "blood gas studies" in the plural. However, as Judge Hall pointed out below, the regulations which define how ventilatory and blood gas tests are conducted reflect that such tests consist of a set of multiple studies. (Pet. App. 20a-21a).[2] In light of these regulations, it is certainly reasonable to interpret the language of sub-paragraphs (a)(2) and (3) to require only one qualifying set of ventilatory or blood gas studies to invoke the presumption.

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[2] The Federal Respondent cites two regulations which use the word "study" in the singular. Brief of the Federal Respondent, p. 18, n.16. A close examination of those provisions, however, reveals that the word "study" in each case is used to connote only a single component of the set which invokes the presumption.

Both the Petitioners and the Federal Respondent place great emphasis on the word "establishes" in subsection (a) of the regulation. They construe this word to mean that a claimant must prove each of the medical requirements by a preponderance of the evidence. By doing so, the parties misconstrue the word "establish." As Judge Hall indicated in his opinion,

> " 'Establish' as used in Part (a) simply means that the claimant must prove at least one of the factual prerequisites to invoke the presumption, i.e. one qualifying x-ray, one set of qualifying ventilatory or blood gas studies, or the documented opinion of one physician. As used in Part (b), 'establish' means that the employer must prove the facts necessary to rebut the presumption and ultimately to persuade the factfinder that the claimant is not entitled to benefits."

(Pet. App. 22a, n. 8)

In other words, a claimant must prove that the item of medical evidence he submits meets certain requirements of reliability and authenticity, see 20 C.F.R. § 727.206(a) (incorporating Subpart D of Part 410 of Title 20), and that such evidence meets the qualifying standards in subsection (a) of the regulation.[3] This is what subsection (a) requires of the claimant to invoke the presumption.

The Fourth Circuit's interpretation is further supported by the inclusion of the "all relevant evidence" requirement in only subsection (b) of the regulation. Congress required in the statute that "in determining the validity of claims . . . all relevant evidence shall be considered . . . ." 30 U.S.C. § 923(b). The Secretary of Labor, mindful of this requirement but also aware of Congressional intent, specifically placed in the rebuttal stage the requirement that all relevant medical evidence

[3] As shown elsewhere, respondents frequently attack the reliability and authenticity of medical evidence under the cited regulations.

be considered in adjudicating a claim. Had the Secretary meant to require that all relevant evidence be considered when invoking the presumption, it would have been simple and more logical to have placed the "all relevant evidence" language at the beginning of Section 727.203. This was not done.[4]

On the other hand, the reading of the regulation advanced by Petitioners and the Federal Respondent would, in some cases, make the rebuttal section of the regulation superfluous and run afoul of the congressional direction that the presumption not be irrebuttable. For example, as the Federal Respondent acknowledges, under (a)(1), if by a preponderance of x-ray, biopsy or autopsy evidence, a claimant proves that he suffers from pneumoconiosis, as a practical matter there is no further evidence that the coal mine operator could submit on rebuttal to refute the establishment of the disease pursuant to (b)(4). Brief of Federal Respondent, pp. 23-24. The operator would either have to offer the same evidence he had offered during the invocation stage (Pet. App. 96a-97a (Opinion, Widener, J.)) or the presumption

[4] Petitioners argue that the "where relevant" language of Section 413(b), 30 U.S.C. § 923(b), requires the trier of fact to weigh all evidence at the invocation stage of the presumption. (Petitioners' Brief, p. 24). Section 413(b) reads in relevant part, "in determining the validity of claims under this part, all relevant evidence shall be considered, including, *where relevant*, medical tests such as blood gas studies . . . ." (emphasis supplied). Petitioners argue that since a respondent's contrary evidence would be "relevant" at the invocation stage, Section 413(b) mandates its introduction at that time. In other words, Petitioners would define "where relevant" as pointing to a specific chronological point in the evidentiary process.

This argument is specious and misreads Section 413(b). The section lists ten categories of evidence which may be used to support a claim. Without the "where relevant" language, this section would require the trier of fact to consider evidence in all ten categories before he could determine the validity of a claim. The "where relevant" qualifier means that the trier of fact need only consider the evidence in those categories introduced by the parties in a particular case.

that the claimant has pneumoconiosis must be treated as irrebuttable (Pet. App. 21a (Opinion, Hall, J.)). This clearly conflicts with the congressional and agency intent.

Petitioners attempt to circumvent the plain meaning of Section 727.203(a) by repeatedly, and incorrectly, arguing that the Fourth Circuit's interpretation would effectively deprive the coal mine operator of the opportunity to prevent invocation of the interim presumption. Petitioners rashly assert:

> "The court below held that *any* single piece of evidence, regardless of reliability or weight, is sufficient to invoke the presumption. The defendant, in turn, has no right to question or challenge claimant's invoking evidence."

Petitioners' Brief, p. 6.[5]

Likewise, the Amicus National Coal Association claims that the Fourth Circuit view of the interim presumption would permit eligibility for benefits "as a matter of law by presumption of any supporting evidence whether or not such evidence is credible or reliable, or the fact to be found on the basis of it is supported by a preponderance

[5] Likewise, Petitioners assert that the Fourth Circuit's single evidence invocation "gives possibly false evidence absolute judicial protection," *Ibid.* at 28, and claims that the Fourth Circuit holding "largely ousts judicial review of invocation fact-finding." *Id.* at 42 (fn. 55). These assertions continue a pattern beginning in the Petition for Writ of Certiorari where the Questions Presented section includes a statement that the Fourth Circuit permitted invocation "as a matter of law by presentation of any supporting evidence whether or not such evidence is credible or reliable. . ." Petition for Cert. at (i), and claims that, "The Fourth Circuit's unique holding has, in effect, made the invocation of this presumption an *ex parte* phase of the proceeding." *Id.* at 10. The Petitioners further claim that the Fourth Circuit's interpretations preclude the "effective right of cross-examination in the invocation phase" and "created a phenomenon which, petitioners believe, is unknown in federal civil litigation in the United States—an offer of proof of material fact which cannot be refuted, must be accepted by the trier of fact and is not, in effect, subject to appellate review." *Id.* at 14.

of the relevant evidence." Brief of Amicus National Coal Association, p. 4.[6]

These bold assertions by Petitioners and the National Coal Association are patently false.[7] An operator or other

[6] When confronted by the almost identical claims in the petitions for rehearing in *Revak v. National Mines Corp.*, discussed *infra*, the Third Circuit replied that it was "unpersuaded by the predictions *in terrorem* about the impact of our decision. Under our holding, and under the plain language of the regulation, the weighing of evidence that does not occur before invoking the presumption simply occurs at the rebuttal stage. All relevant evidence must be considered at that point, and the mine operators may rebut on the basis of all the grounds provided by § 727.203(b)." Op. Sur Denial of Panel Rehearing at 3 (March 6, 1987).

[7] In contrast to the Petitioners' assertions, the Director asserts that the invocation question is of relatively little practical significance. (Brief of Federal Respondent, pp. 16-17). This assertion is in one sense correct but in a more fundamental sense misses the point.

It is true that in a well litigated federal black lung case, because all evidence must be considered at the rebuttal stage, the question of whether the claimant is totally disabled as a result of a respiratory impairment arising from coal mine employment will very often be determined in the exactly identical way whether the presumption is invoked by a preponderance of the evidence or by a single item of evidence within a given category. At the same time, this will often not be true. As the Director indicates, approximately 10,000 pending claims will be affected by this decision. Brief of Federal Respondent, p. 3. Very often, at some point during the many years of administrative and appellate litigation of a black lung claim, the claimant becomes unable to undertake additional testing. Many elderly coal miners suffer strokes, heart attacks and other disabling conditions which make further testing impossible. More tragically, many miners die. This frequently means that items of evidence within a given category may no longer be developed and only a single or small number of items of evidence exist. The question of the method of invocation then often becomes ultimately determinative.

As discussed elsewhere in this Brief, Congress looked long and hard at this problem and determined that the risk of such incomplete medical knowledge in a given claim, whether because of the unavailability of the claimant or the lack of reliable medical techniques, should be borne, not by the claimant, but by the party attempting to prevent eligibility. This decision was consciously and

party seeking to prevent invocation ma[illegible]tack evidence submitted on behalf of the claimant in at least four ways: (a) questioning years of coal mine employment; (b) contesting the authenticity of the medical evidence proffered; (c) disputing the qualifications of the medical source of a given piece of evidence; and (d) establishing that the quality and reliability standards required by the regulations have not been met.

Since Congress found during the extensive hearings undertaken in 1972 and 1977 that exposure to coal dust for more than ten years was likely to lead to pneumoconiosis, the regulation's initial requirement is proof of more than ten years of eligible work. The operator may challenge the claimant's assertion of work years. A plethora of cases exists at the administrative and court level in which this issue was litigated in substantial detail. *See, e.g., Southard v. Director, OWCP*, 732 F.2d 66 (6th Cir. 1984), and cases cited therein; *Settlemoir v. Old Ben Coal Co.*, 9 B.L.R. (MB) 1-109 (1982). Likewise, the party opposing invocation may question the authenticity of any particular document.

The qualifications of the source of an item of evidence may be, and often are, questioned. The regulations specifically require that interpretation of x-rays for certain purposes be credited if taken by Board-certified or Board-eligible radiologists. 20 C.F.R. § 727.206(b)(1).

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explicitly made by Congress. Thus, the Federal Respondent's Brief misses the point in that the question of who has the burden of proof is sometimes dispositive where there is limited knowledge due to the availability of the claimant, medical facilities or medical techniques. Finally, the fact that a decision favorable to claimants would compel reconsideration of a large number of denied claims should not dissuade this Court from so ruling. *See In Re: James Sebben, et al. v. William E. Brock, III et al.*, Nos. 86-1295, 86-1315, slip op. (8th Cir. filed Mar. 25, 1987) (certifying as a class certain claimants denied the benefit of 727.203(a)(1) and not afforded the opportunity to submit a claim under 410.490).

Finally, and most importantly, the operator may and frequently does, challenge the quality and reliability of particular tests submitted on behalf of a claimant.[8] Again, the regulations set forth specific standards for the quality and reliability of medical evidence. For example, chest x-rays must be interpreted according to the ILO-U/C International Classification of Radiographs of Pneumoconiosis, 1971 or similar standards. 20 C.F.R. § 410.428(a). Ventilatory studies must contain certain specific data including the forced expiration volume in one second (FEV_1) and the maximum voluntary ventilation (MVV), which must be expressed in liters or liters/minute and must include "three appropriately labeled spirometric tracings, showing distance per second on the abscissa and the distance per liter on the ordinate" with a paper speed for the FEV_1 of at least 20 mm/second as well as other specific requirements. 20 C.F.R. § 410.430.

These quality standards were carefully selected by the Secretary (*see, e.g.*, 43 Fed.Reg. at 36,826) and provide medical tests with a degree of reliability at least sufficient to satisfy the claimant's initial burden to produce evidence to establish the presumption. Judge Widener, in his opinion below, explicitly stated that he was persuaded to adopt the single evidence standard for invocation at least in part because of the safeguards provided by the quality standards:

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[8] Indeed, the author of Petitioners' Brief, at another time, stated explicitly: "Another point uniformly applied is that evidence not meeting applicable quality standards may not be used to invoke the interim presumption," citing *Carroll v. Califano*, 619 F.2d 1157 (6th Cir. 1980); *Sharpless v. Califano*, 585 F.2d 664 (4th Cir. 1978); *Johnson v. Califano*, 585 F.2d 89 (4th Cir. 1978); *Welsh v. Weinberger*, 407 F.Supp. 1043 (D. Md. 1975); *Ward v. Matthews*, 403 F.Supp. 95 (E.D. Tenn. 1975); *Harness v. Weinberger*, 401 F.Supp. 9 (E.D. Tenn. 1975). Solomons, "A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues," 83 *W.Va. L. Rev.* 869, 903-904 (1981). *See also* Federal Respondent's Brief, p. 8, n.7.

> "This interpretation is particularly acceptable to me in light of the fact that an X-ray or blood gas or ventilatory tests must meet precise standards prescribed by the regulations to qualify to invoke the presumption." [citation to regulations omitted]

(Pet. App. 94a-95a)

Finally, it is worthy of remembrance at this point that the Fourth Circuit also found that all relevant evidence must be considered at the rebuttal stage. 20 C.F.R. § 727.203(b). The consequences for this case are clear: as indicated by the Federal Respondent, "the basic fact thus 'established' at the invocation stage remains fully open for relitigation on rebuttal, with the burden of persuasion having shifted to the operator or Director." Brief of Federal Respondent, p. 15. Consequently, if a coal operator has evidence which in its view overcomes the claimant's invoking evidence, the operator has ample opportunity to present it at the rebuttal stage of the case. Such would be the result in the two cases cited by Petitioners in their Brief: *Haynes v. Jewell Ridge Coal Corp.*, 790 F.2d 1113 (4th Cir. 1986), and *Lagamba v. Consolidation Coal Co.*, 787 F.2d 172 (4th Cir. 1986) cited in Petitioner's Brief, pp. 28, 29. In each of these cases the coal operator apparently had substantial evidence which, when offered, would preponderate and rebut the presumption. If anything, these cases prove rather than disprove the proposition that the rights of the operator are fully protected by the opportunity to present all evidence in rebuttal, and that if that opportunity is grasped, no unjust results will obtain.

Thus, the shrill cry of the operators that they are faced with the invocation of the presumption based upon a single piece of evidence which they cannot challenge with regard to reliability is baldly fallacious. The plain fact is that operators may and frequently do challenge the accuracy and reliability of such evidence at the invocation stage and offer all of their evidence in rebuttal. Their claims to the contrary tend to reveal their actual

purpose of these arguments—to undo the burden consciously placed upon them due to imperfect knowledge as explicitly established by Congress in 1977.[9]

II. THE LEGISLATIVE HISTORY OF THE BLACK LUNG ACT COMPELS THE CONCLUSION THAT A CLAIMANT MAY INVOKE THE PRESUMPTION OF SECTION 727.203(a) BY PRODUCING A SINGLE ITEM OF QUALIFYING EVIDENCE

Although the express language and structure of Section 727.203 provide an ample basis for the Fourth Circuit's decision, a review of the legislative history surrounding the Black Lung Act, as amended, compels the same result. Although the issue directly involved here relates to an agency regulation, a review of the legislative history is singularly appropriate here for two reasons. First, as Judge Sprouse explained below:

> ". . . the circumstances surrounding the drafting and promulgation of the interim presumption regulation represent an unusual turn in administrative law. Contrary to the usual interpretative posture, agency intent here can be inferred directly from congressional action because congressional staff worked directly with the Labor Department to tailor the final version of the interim presumption."

(Pet. App. 61a) Secondly, from passage of the Act in 1969 to promulgation of the interim presumption regulation in 1978, Congress was uniquely concerned with the procedural and evidentiary obstacles which it viewed as impeding its efforts to provide benefits to deserving coal miners. Most of the legislative history reflects the congressional effort to eliminate those obstacles.

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[9] The kind of burden shifting found in § 727.203(a) is not unique in federal law. For example, in a more extreme case, under 21 U.S.C. § 881 (which incorporates the customs statute, 19 U.S.C. § 1615) the government need only show that there is probable cause that property it wishes to seize was used in connection with criminal activity. Once probable cause is shown, the burden shifts to the party claiming the property to establish his claim to the property by a preponderance of the evidence. *See, United States v. One 56-Foot Yacht Named Tahuna*, 702 F.2d 1276 (9th Cir. 1983).

The Black Lung Act was an amendment adopted as part of the Federal Coal Mine Health and Safety Act of 1969. The FCMHSA was a sweeping congressional effort providing safety and health standards in an attempt to arrest the inordinate toll in deaths, sickness and injury in the coal mining industry. One particular health hazard addressed by the Act was the high level of coal dust affecting the respiratory systems of coal miners.[10]

From the moment the Black Lung Amendment was first introduced, Congress acknowledged that it was dealing with a very unique occupational disease and social problem. During the debates Senator Javits stated:

> "This [Black Lung Amendment] is an unusual and dramatic proposal—but it is directed at an unusual and dramatic problem—our sublime insensitivity to what is probably the worst occupational disease in the country—black lung."

115 Cong. Rec. 27,627 (1969).

Similarly, in the House, Congressman Perkins argued that Congress should single out black lung for special federal treatment:

> ". . . we should not lose sight of the fact that we are dealing with a special compensation statute solely because this occupation is so hazardous. There are 10 times more fatal accidents in this industry than in all other industries. We have a disease here that may have been contracted 10 or 20 years ago, but the individual will never be compensated for it because the States will never enact retroactive laws to provide compensation for it. It is because of the insidious nature of this disease, pneumoconiosis, that we are enacting this special provision."

115 Cong. Rec. 32,015 (1969).

After enactment of the black lung program, however, Congress found that its original intent was being

[10] See Section 202 of the Act, as amended, 30 U.S.C. § 842, which provides certain standards for the maximum allowable amount of coal dust in the coal mine air.

thwarted. During the first two years of the program, few black lung claims were approved and members of both Houses proposed amendments to the original Act to speed up processing and increase the percentage of claim approvals.

The difficulties which deserving claimants experienced at the hands of the Social Security Administration brought these problems squarely before Congress during the debate leading up to the 1972 Amendments. The legislative history surrounding those Amendments is replete with testimony and discussion that the existing medical techniques and facilities to test for black lung were inadequate to reliably deny claims. During the House floor debate on the 1972 Amendments, Congressman Bevill noted:

> "The assessment of damage to health is, under many circumstances, an imperfect art . . . . We have to keep in mind that there was a time when physicians could not even agree on a definition for black lung disease."

117 Cong. Rec. 36,497 (1971). Congressman Reid stated:

> "Testimony indicates that only 28 percent of the black-lung applications have been approved in Kentucky, 44 percent in West Virginia and 69 percent in Pennsylvania. Just because Pennsylvania has had an effective state black-lung compensation law, and better medical facilities for examinations, the approval rate for applications under Federal law has been higher. In my view, it is unfair to penalize a coal miner or his widow in Kentucky or West Virginia just because the medical facilities or records are unavailable."

H. R. Rep. No. 460, 92d Cong., 1st Sess., at 33 (1971) (Separate Views of Congressman Reid).

The use of negative x-ray readings by SSA to deny claims came under particularly sharp attack by Congress.[11] In criticizing the use of the x-rays and the sim-

[11] The use of x-rays was most prevalent because of the lack of facilities to administer more specialized pulmonary function and

ple breathing test, Congressman Hechler told the full House that:

> "On September 12, 1971, a statement by 12 doctors assembled in Beckley, WVa., indicated that the Social Security Administration's use of a single chest X-ray and simple breathing test was 'unduly and unnecessarily restrictive.' Dr. John Rankin, chairman of the department of preventative medicine at the University of Wisconsin and a specialist in lung disease said the simple breathing test employed by the Social Security Administration often fails to measure black lung disability. The New York Academy of Sciences sponsored an international conference on coal workers' pneumoconiosis on September 13 through 17, and lung specialists from all over the world presented their analyses of how to test and measure pneumoconiosis. These papers conclusively demonstrate that you cannot rely on a simple X-ray to determine either the presence of pneumoconiosis, or the extent of disability resulting from it."

117 Cong. Rec. 36,506 (1971).

In light of these problems, the 1972 Amendments liberalized eligibility criteria, extended coverage and specifically prohibited the denial of a claim based solely upon a negative x-ray. In addition, both Houses of Congress in the debates and reports leading up to the 1972 Amendments, admonished the Social Security Administration to adopt new procedures to alleviate the backlog of claims in light of the documented lack of medical facilities and techniques. During the House floor debate on H.R. 9212, Congressman Helstoski stated:

> ". . . the Social Security Administration must recognize the human problems involved here and compassionately assist miners and their families in trying to prove their eligibility for black lung benefits.
>
> After decades of neglect by coal mine operators, company doctors, and lax State officials, it is no surprise to find that miners in States such as Kentucky and West Virginia have difficulty in proving their eligibility for the benefits program. Testing facilities usually did not exist and medical records have been scanty or misleading. The Social Security Administration must, therefore, bend over backwards and give the benefit of the doubt to the miner or his survivors."

117 Cong. Rec. 40,439 (1971).

Similar, but more specific, commands came from the Senate side of the aisle:

> ". . . the backlog of claims which have been filed . . . cannot await the establishment of new facilities or the development of new medical procedures. They must be handled under present circumstances in the light of limited medical resources and techniques.
>
> Accordingly, the [Senate] Committee expects the Secretary [of HEW] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these amendments. Such interim rules and criteria shall give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than breathing tests when it is not feasible or practicable to provide physical performance tests of the type described [in the HEW annual report]."

S. Rep. No. 743, 92d Cong., 2d Sess., at 18 (1972).

In response to these directions, the Social Security Administration promulgated the predecessor to the interim regulation at issue here. 20 C.F.R. § 410.490. As admin-

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blood gas tests. In fact, during the House floor debate on H.R. 9212, Congressman Reid noted that the blood gas testing was only then being pioneered and indicated that the Social Security Administration objected to the blood gas tests because they were thought to be too complicated and required too much medical expertise to be widely used. 117 Cong. Rec. 36,502 (1971).

istered by SSA,[12] the interim presumption had its desired effect and the approval rate of claims filed with the SSA increased significantly. However, the SSA interim presumption did not apply to claims filed after June 30, 1973, which were to be administered by the Department of Labor under Part C of the Act.

Criticism directed at the Department of Labor continued to focus on the lack of medical techniques and facilities, and the unreliability of using non-qualifying evidence to deny claims. In September of 1974, the Solicitor of Labor wrote to the General Counsel of HEW and urged that the Social Security Administration authorize the application of the interim presumption to claims handled by the Department of Labor. In that letter the Solicitor raised the same concerns that had been raised by Congress:

> "It must also be noted that those few claimants . . . who are willing to engage in the further pursuit of proof of entitlement must subject themselves to a battery of expensive, time consuming and often unpleasant medical procedures. Frequently, there are no facilities available to conduct these tests near the claimant's residence. The 1972 Amendments were enacted largely to ease the difficult evidentiary burden facing all black lung claimants. Social Security has negated this intent insofar as transitional and Part C claimants are concerned by promulgating variant standards of eligibility which will certainly result in the denial of benefits to an unknown number of worthy claimants who, within the intent of the 1972 amendments, should be found eligible."

Letter from Department of Labor Solicitor Kilberg to HEW General Counsel Rhinelander (Sept. 13, 1974) reprinted in H.R. Rep. No. 151, 95th Cong., 1st Sess., at 17 (1977).

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[12] As discussed *infra*, SSA was later criticized by some who felt that SSA was treating the interim presumption as essentially irrebuttable and awarding benefits based upon a single item of qualifying evidence without rebuttal inquiry.

While the debate in Congress continued, this Court sustained, *inter alia*, against constitutional attack, the statutory presumptions in the Black Lung Act and the prohibition against using a chest x-ray to defeat a claim for benefits. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In rendering its decision, this Court recognized the validity of Congress' informed decision to shift the evidentiary burdens and to resolve doubts in favor of the disabled miner because of the unreliability of medical evidence. This Court noted that the reliability of negative x-ray evidence was "debated forcefully on both sides before the Congress" and that the Court would not engage in a judicial reconsideration of the conclusions of Congress on the issue. *Ibid.* at 33.

The legitimacy of Black Lung presumptions having been upheld by this Court, members of Congress continued to seek similar ways to ease the evidentiary burden of claimants. A proposal was offered which would have instructed the Secretary of Labor to apply standards "no more restrictive than" those contained in the SSA interim presumption to all claims handled by the Department of Labor. By the time this proposal was considered by the 95th Congress in 1977, however, the use of the SSA interim presumption was itself being hotly debated. Those advocating the expanded use of the presumption argued that the "new facilities" and "new medical procedures" referenced specifically in the 1972 Senate direction to SSA had not yet become a reality and therefore the unreliability of current medical testing necessitated the use of the interim presumption. See H.R. Rep. No. 151, 95th Cong., 1st Sess., at 15 (1977).

Others, however, harshly criticized the SSA presumption and argued against its expanded use. Dr. Herbert Blumenfeld, for example, who was working at SSA at the time he appeared before the Senate Subcommittee on Labor and Public Welfare testified that the only "practicable way" SSA could respond to the 1972 Senate's ad-

monition was to establish criteria which permitted an award if some level of disease is detected whether or not any impairment was present. Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess., 194 (1977). These divergent views made it clear that those in Congress who sought expanded use of the interim presumption faced a difficult fight.

Despite this controversy, the House passed a version of the Black Lung Benefits Reform Act of 1977 which required the Secretary of Labor to apply standards "no more restrictive than" those contained in the SSA interim presumption. As passed by the House the presumption was to apply to *all* claims filed with the Secretary of Labor and not just on an interim basis. The Senate, however, rejected the use of the SSA interim presumption and its version authorized the Secretary to promulgate permanent medical eligibility criteria as he saw fit. These sharply contrasting views foreshadowed the bruising fight which would ensue between the House and Senate conferees over use of the presumption.

After four months of vigorous debate and considerable "stress and strain" between the conferees, a compromise was reached which resulted in an apparent victory for both sides. *See* 124 Cong. Rec. 2332-3 (1978). (Statements of Reps. Randolph and Williams on the passage of the Conference Report on H.R. 4544). Rather than working out their differences the conferees simply merged the Senate and House bills. According to the compromise the House won the expanded use of a presumption which could be "no more restrictive" than the presumption standards employed by SSA. However, the use of the presumption by DOL would only be for an interim period until, as the Senate had authorized, the Secretary had promulgated new permanent Part C medical eligibility regulations. See 30 U.S.C. § 902(f)(2).

Pursuant to the 1977 Amendments, the Department of Labor then drafted new interim regulations. Prior to publication, congressional staff worked directly with the Labor Department to draft the final version:

> "The final draft of the [Labor] Department's new regulations were approved within the Department and, prior to publication, sent to selected congressional staff members for review and presumably for approval. These regulations were reviewed by both congressional staff and professional persons associated with the various black lung associations. As a result of this initial review, the Department's proposed 'interim presumption,' after close scrutiny, was severely criticized. Other parts of the regulations were also criticized, thus failing to win the approval of those reviewing the proposal."
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> "One of the proposed sections would have prohibited the approval of a claim unless the file demonstrated that a full series of medical tests had been conducted. The Black Lung Association and congressional staff objected strenuously and the section was removed."

Solomons, *supra*, 896, 896 n. 138. More specifically for the inquiry in this case, the congressional staff struck a provision similar to the construction of the interim presumption the Petitioners and Director argue for here:

> "Another provision would have required the adjudicator to weigh all the medical test evidence to determine whether the weight of this evidence established total disability. This too was stricken by congressional command."

Id. at p. 897 n. 138.

That the Secretary ultimately agreed to a regulation which would allow invocation of the presumption on the basis of a single item of qualifying medical evidence is reflected in the comments of the Secretary which accompanied the final promulgation of the interim presumption:

> ". . . the Department cannot, as has been requested by some, look for the single item of evidence which would qualify a claimant on the basis of the interim presumption, and ignore other previously obtained evidence. This does not mean that the *single item of evidence which establishes the presumption* is overcome by a single item of evidence which rebuts the presumption." (emphasis supplied)

Notice of Final Rule Making Under The Black Lung Benefits Reform Act of 1977, 43 Fed. Reg., 36,826 (1978). As Judge Widener of the Fourth Circuit stated below, these comments expressly reveal that the Secretary's intention was to allow invocation merely upon the production by the claimant of single item of qualifying evidence. (Pet. App. 94a).[13]

The conclusion that can be reached from all of the foregoing is that Congress meant for the invocation of the presumption to be liberal in order to facilitate the ability of coal miners to prove their claims. From the passage of the Black Lung Act in 1969 through the promulgation of the regulation in 1978, Congress continued to hear evidence that imprecise medical tests were an unreliable basis for denying claims. In 1972, Congress admonished the Social Security Administration to liberalize its criteria and promulgate an interim presumption to facilitate the processing of claims and significantly increase the percentage of black lung awards.

With respect to Department of Labor claims, Congress continued to debate the ability of the medical community

[13] The Petitioners in their Brief argue that this Comment only posits an example of the Department's intention that all relevant rebuttal evidence be considered. Brief of Petitioners, p. 30, n.45. This interpretation ignores the plain meaning and consequence of the second sentence of the Comment. The basic point is that a single item of evidence offered by the coal operator or Director is not considered until the rebuttal stage of the proceeding. The Comment does not contemplate any distinction between a single item of "like kind evidence" or a single item of "other relevant" evidence.

to reliably detect the presence or absence of black lung in a coal miner's lungs. By 1977 there was considerable controversy over use of the interim presumption in Department of Labor claims. The House mandated usage; the Senate did not. After much heated debate, the conferees reached a compromise allowing the use of the presumption for a specific period until the Secretary of Labor could promulgate permanent medical criteria. Thereafter, the Secretary worked closely with congressional staff in drafting the interim presumption at issue here so that agency intent can be inferred from congressional intent. Finally, the comments accompanying the regulation clearly indicate that the Secretary intended invocation upon the production of a single item of qualifying evidence.

III. THE PETITIONERS' ARGUMENT CONCERNING CONSISTENCY OF INTERPRETATION AND DEFERENCE IS WITHOUT MERIT

Turning next to the argument concerning interpretation of the regulation over time, Petitioners argue that weighing relevant evidence prior to invocation is "the consistent and unwavering fifteen-year construction of the invocation provisions of the interim presumption by multiple Secretaries of HHS and Labor . . . ." Petitioners' Brief, p. 33.[14]

It must be emphasized that the Petitioners' treatment of this subject does not rely upon a formal statement of agency policy to support this proposition.[15] Rather, it

[14] The Director less strongly asserts simply that "it has long been clear that all like-kind evidence is weighed in determining invocation of the presumption available to Part B claimants under 20 C.F.R. 410.490(b)." Federal Respondent's Brief, p. 31.

[15] In its denial of petition for rehearing in *Revak v. National Mines Corp.*, discussed *infra*, the Third Circuit observed that "it is not a simple matter for us to derive the Director's position from judicial or agency decisions, and the briefs in the cases relied on by the parties to show the Director's 'consistent position' are not readily accessible to us." Op. Sur Denial of Panel Rehearing at 3 (March 6, 1987).

supports this assertion by citation of cases which it claims indicate a consistent practice of weighing all evidence within a given category.[16]

Judicial review of agency action in black lung claims is not the uniform pattern asserted by Petitioners in support of the weighing of evidence at the invocation stage. The Seventh Circuit in *Amax Coal Co. v. Director, OWCP*, 801 F.2d 958, 962 (7th Cir. 1986), explicitly agreed with the standard enunciated by the Fourth Circuit in the instant case. Crucially, the Seventh Circuit also observed that, "the Fourth Circuit's holding that a single physician's opinion permits an ALJ to invoke the § 727.203(a) presumption is in accord with our decisions." *Ibid.*[17] *Cf. Kuehner v. Ziegler Coal Co.*, 788 F.2d 439 (7th Cir. 1986).

While mixed, the earlier Sixth Circuit precedent does not support the claim that there has been a consistent fifteen-year interpretation of the interim presumption. *Hatfield v. Secretary of HHS*, 743 F.2d, 1150, 1155 (6th Cir. 1984) (single positive x-ray triggers presumption);

[16] A review of the cited cases reveals that most involved situations in which the litigants chose to argue other issues and did not brief and argue the issue whether a single piece of evidence invokes the interim presumption. Moreover, an agency position propounded solely for the purpose of litigation should not be entitled to deference and should carry weight only to the extent that it is persuasive in its own right. *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977); *Kickapoo Oil Co. v. Murphy Oil Corp.*, 779 F.2d 61, 67 (Em. App. 1985). Judge Widener below, for example, indicated his "hesit[ancy] to extend the concept of deference so as to permit any agency in such a posture effectively to resolve appeals by its own actions. This would abdicate much of the responsibility for appellate review of federal administrative agencies to the agencies for self review." (Pet. App. 60a).

[17] In a relatively obvious reference to the reasoned opinion inquiry which is to be undertaken at the invocation stage by the ALJ, the Seventh Circuit went on to hold that a single piece of evidence "permits—although it does not necessarily require—an ALJ to invoke the § 727.203(a)(4) presumption." 801 F.2d at 962.

Haywood v. Secretary of HHS, 699 F.2d 277, 283-285 (6th Cir. 1983) (same); *Miniard v. Califano*, 618 F.2d 405 (6th Cir. 1980) (same); *Dickson v. Califano*, 590 F.2d 616, 622-23 (6th Cir. 1978) (same); *see also Singleton v. Califano*, 591 F.2d 383 (6th Cir. 1979) (other medical evidence). Recently, with no discussion of the legislative history, the structure of the regulation, or the APA, a panel in the Sixth Circuit simply asserted that since earlier cases permitted weighing of evidence, the Sixth Circuit had not adopted the Fourth Circuit's view below. *Back v. Director, OWCP*, 796 F.2d 169 (6th Cir. 1986); *see also Engle v. Director, OWCP*, 792 F.2d 63 (6th Cir. 1986). This very brief panel decision contained no analysis of any of the major issues discussed by the Fourth Circuit in the instant matter below nor did it contain a detailed review of its own Circuit's earlier cases, many of which were not consistent with the panel's view.

A far more thorough and complete analysis of the underlying issues involving the question of the proper method for invoking the interim presumption was undertaken by the Third Circuit in *Revak v. National Mines Corp.*, 808 F.2d 996 (3rd Cir. 1986). In that case a miner with thirty-five years of underground coal mine experience was denied benefits by an ALJ and the Benefits Review Board upon a finding that he had not offered sufficient evidence to invoke the interim presumption. In reversing the ALJ and BRB, the Third Circuit agreed with the Fourth Circuit's analysis below and found that the claimant had produced sufficient evidence in the form of a reasoned doctor's opinion and a ventilatory study to invoke the 727.203(a) presumption. The Third Circuit indicated that its decision was consistent with that of the Fourth Circuit below and the Seventh Circuit in *Amax Coal*, but in contrast to the Sixth Circuit in *Engle*. The Third Circuit noted that the "*Engle* court provided no reasoning for [its] position." *Ibid.* at 1000.

In reaching its decision, the Third Circuit undertook a far more complete analysis of the arguments for and against the balancing of evidence at the invocation stage. The Court stated:

> "The most important reason for rejecting the balancing approach to the interim presumption is the language and structure of the regulation itself."

Id. at 1000. After an analysis of the structure of the regulation, it gave a persuasive example of the erroneous result which a balancing test would necessitate:

> "One explicit ground for rebuttal, § 203(b)(4), is that all the relevant evidence demonstrates that the miner does not have pneumoconiosis. [footnote omitted]. Such a provision would be superfluous if the ALJ were already to have considered all the relevant medical evidence at the initial presumption stage. Moreover, the appellees' theory would place the burden on the miner to prove by a preponderance of the medical evidence at the presumption stage that he had pneumoconiosis. Such an interpretation would *deprive the interim presumption of any presumptive effect.*" [footnote omitted] (emphasis supplied)

Id. at 1001.

The *Revak* Court went on to analyze the legislative history and found that it supported its view of single evidence invocation. It noted that a study cited by Congressman Paul Simon found that autopsies of 400 coal miners with more than twenty years of coal mine experience indicated that 90-95% of them suffered from pneumoconiosis. *Id.* at 1002. The Court noted that such evidence provided an empirical basis upon which the single positive test method of invocation would rest, "thus shifting some of the risk of faulty test results onto the employer." *Id.* at 1002. Likewise, it found that deference to alleged agency interpretation was inappropriate. *Id.* at 1002-1004.

Finally, lack of consistency of interpretation is illustrated even within the Fourth Circuit prior to the instant case in the matter of *Consolidation Coal Co. v. Sanati*, 713 F.2d 480 (4th Cir. 1983). That case involved the question of the proper method of invoking subparagraph (a)(4) of the 727.203 interim presumption:

> "The ALJ, however, invoked the presumption solely on the basis of one physician's opinion, reasoning that the documented and reasoned opinion of one physician alone requires the invocation of the presumption under (a)(4) regardless of the existence of, and without weighing, other contrary evidence. The Benefits Review Board affirmed the ALJ's determination [citing *Stiner v. Bethlehem Mines Corp.*, 3 B.L.R. (MB) 1-487 (1981)]."

Ibid. at 481. Without discussing the structure of the provision in question or the legislative history, the 2-to-1 panel majority in *Sanati* held that, "the claimant has the burden of proving by preponderance of the evidence all the facts necessary to establish the presumption." *Id.* at 482. This ruling was, of course, explicitly overruled by the Fourth Circuit in the case now before this Court.[18]

IV. SECTION 7(c) OF THE APA, BY ITS OWN TERMS, DOES NOT REQUIRE THAT THE REGULATION BE READ TO REQUIRE THE PREPONDERANCE OF THE EVIDENCE STANDARD IN RELATION TO INTERIM PRESUMPTION INVOCATION FACTS

As a fallback position, Petitioners advance the argument that Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), requires that a preponderance of the evidence standard be read into subsection (a) of 20 C.F.R. § 727.203. The Petitioners assert that reserving consideration of a coal operator's contrary evidence to subsection (b), the rebuttal phase, violates the policies

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[18] It is instructive to note that one of the two-Judge majority in *Sanati* was Judge Widener, who upon a detailed analysis of the issues involved came in the instant matter below to side with the majority concerning single evidence invocation.

embodied in the APA. This argument misses the mark. As shown below, Section 7(c) is inapplicable to the invocation phase of the interim presumption and both the letter and the policy of the APA are met by requiring the consideration of "all relevant evidence" in rebuttal.[19]

It is unnecessary for this Court to reach a determination on that issue. As shown, Section 7(c), by its own terms, does not apply to the invocation stage of the presumption.

Section 7(c) of the APA, 5 U.S.C. § 556(d), provides in relevant part:

> "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . ."

Section 7(c) applies by its terms only to "rules," "orders," and "sanctions." The mere invocation of a pre-

[19] The Federal Respondent makes the argument that Section 7(c) of the APA has been expressly superceded by the Black Lung Act. Brief of Federal Respondent, p. 34, n.30. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a), incorporates by reference Section 19 of the Longshore Act, 33 U.S.C. § 919. Section 919 in turn generally incorporates the APA provisions, including Section 7(c). However, the Black Lung statute contains an express exception to these incorporations where "otherwise provided . . . by regulations of the secretary." 30 U.S.C. § 932(a). The Director also points out that the first sentence of Section 7(c) itself begins "except as otherwise provided by statute . . ." The Director argues that "[t]hose exceptions, together with the broad authorization to promulgate appropriate regulations (30 U.S.C. § 902(f)), give the Secretary, and hence the Director, authority to depart from APA standards." *Id.*

sumption in the course of an adjudication is neither a "rule," "order" or a "sanction."

Invocation of the presumption clearly does not qualify as a "rule" as the term is defined in 5 U.S.C. § 551(4). None of the parties have so asserted.

Furthermore, invocation of the presumption does not constitute an "order" as the term is defined in 5 U.S.C. § 551(6). That section provides:

> " 'Order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;"

In *ITT Corp. v. Local 134, IBEW*, 419 U.S. 428 (1975), this Court held that the statutory definition of "order" as "the whole or part of a final disposition . . . of an agency . . ." means that the disposition must have "some determinate consequences for the party to the proceeding." 419 U.S. at 443. In *ITT Corp.*, an employer filed an unfair labor practice charge against a union under Section 8(b)(4)(D) of the National Labor Relations Act. Pursuant to Section 10(k) of the Act a hearing was held before an agent of the National Labor Relations Board to hear and determine the dispute out of which the unfair labor practice arose. The Board rendered a decision adverse to the union which then indicated it would not comply therewith. A Complaint was thereafter issued on the unfair labor practice charge and a hearing before a trial examiner resulted in a cease and desist order against the union. The union appealed the order partially on the basis that it had not been afforded the protections under the APA at the Section 10(k) hearing.

In holding that the APA did not apply to the Section 10(k) proceeding, this Court noted that, "The Board does not order anybody to do anything at the conclusion of a § 10(k) proceeding . . . . 'the § 10(k) decision standing alone binds no one'. We conclude, therefore, that the § 10(k) determination is not itself a 'final dis-

position' within the meaning of 'order.' . . ." 419 U.S. at 443-444.

The union in *ITT Corp.* further argued, however, that if the Section 10(k) decision was not a "final disposition," it was at least "part of a final disposition" within the meaning of 5 U.S.C. § 551(6). In rejecting the argument this Court responded that:

> "While one might argue that an intermediate proceeding within an agency is necessarily a 'part' of a 'final order,' we think a sounder interpretation of the language Congress used is that the phrase 'a whole or a part' refers to components of that which is itself the final disposition required by the definition of 'order' in § 551(6)."

419 U.S. at 443.

In the context of the Black Lung Act, it is the decision of the Administrative Law Judge and not his mere invocation of the presumption which is the "final disposition" having "determinate consequences" for the parties. The invocation of the presumption, far from being a final decision, rather is an "intermediate proceeding" which "standing alone" binds no one. The binding and consequential agency decision cannot be rendered until after the rebuttal phase. Accordingly, the invocation of the presumption cannot be an "order" under the standards of *ITT Corp.*

Consequently, in light of *ITT Corp.*, the Petitioners attempt to pigeonhole the invocation of the presumption into the definition of a "sanction" within the meaning of 5 U.S.C. § 551(10)(E).[20] That section provides:

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[20] The term "sanction" is of dubious applicability here. A favorable black lung decision is an award of benefits to a disabled miner and not a penalty levied against a coal operator. Nonetheless, the Court need not reach this issue since Section 7(c) does not apply to the invocation stage even if an award is a "sanction" under the APA.

> "'sanction' includes the whole or a part of an agency—
>
> • • •
>
> (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;"

It follows from the discussion *supra* with respect to the definition of "order" that the invocation of the presumption does not itself constitute an agency's assessment of compensation. Again, the mere invocation of the presumption, standing alone, "binds no one." *ITT Corp.*, 419 U.S. at 444.

Similarly, the Petitioners' attempts to argue that the invocation of the presumption is a "part of" the assessment are unavailing. To be consistent with *ITT Corp.*, the phrase "whole or a part" in Section 551(10) must refer to "components of that which is itself" the assessment of compensation. The invocation of the presumption, therefore, does not meet the definition of a "sanction" under the statute. The invocation is only an intermediate step in a *possible* assessment of compensation.

What is clear from the above is that Section 7(c), by its terms, applies, if at all, only when the final disposition is made, or the compensation assessed, and not earlier. All Section 7(c) requires is that the trier of fact weigh all evidence at the close of a hearing and render a final decision or assessment only upon a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91 (1981).

Sensing the weakness of their "part of" argument, Petitioners assert that in many cases the presumption is so difficult to rebut that invocation of the presumption is the functional equivalent of a "final disposition," and that therefore the APA should apply. This argument fails for several reasons. First, as shown above, it does not square with the interpretations of "order" and "sanction" mandated by *ITT Corp.* Secondly, as shown elsewhere, there are a number of ways that operators can and do challenge the invocation of the presumption.

Thirdly, Section 727.203 as interpreted by the Fourth Circuit provides a coal mine operator with abundant opportunity to submit rebuttal evidence and under the "all relevant medical evidence" provision of subsection (b), the ALJ is commanded to consider it. Hence, the protections of Section 7(c) are fully afforded black lung respondents.[21] Finally, the APA is a statute of general application and its provisions should not be effectively rewritten merely because an operator has difficulty in proving its case in a particular claim.

CONCLUSION

Based upon all of the foregoing, the judgment of the Fourth Circuit holding that under 20 C.F.R. § 727.203 (a) a black lung claimant may invoke the presumption upon a showing of ten years of coal mine employment and the production of a single item of qualifying evidence should be affirmed.

Respectfully submitted,

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[21] The Federal Respondent acknowledges that the Fourth Circuit's interpretation of the interim presumption is entirely consistent with Section 7(c) of the APA. Brief of Federal Respondent, p. 35, n.32.